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The Professionalization of Law Firm In-House Counsel

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THE PROFESSIONALIZATION OF LAW FIRM IN-HOUSE COUNSEL

ELIZABETH CHAMBLISS*

This Article examines the structural evolution of the “firm counsel” position from a volunteer, part-time position filled by an existing partner to a specialized, often full-time position increasingly filled by career in-house counsel. Based on focus groups and interviews with firm counsel, as well as participant observation at meetings and conferences aimed at firm counsel, I examine how the professionalization of the firm counsel position affects: (1) the definition of the firm as the client; (2) the authority of firm counsel with partners; and (3) firm counsels’ professional commitments and attitudes about ethical rules.

I find that, from a regulatory standpoint, the professionalization of firm counsel is a positive development. The increasing formalization and specialization of the firm counsel position has helped to clarify the identity of the firm as a client without compromising the authority or commitment of lawyers who serve in that role. Although “professional” firm counsel—that is, full-time firm counsel and those appointed from outside the firm—tend to draw on different sources of authority than part-time firm counsel who “grew up” in the firm, most respondents report that their role is expanding and that they have sufficient authority to be effective. I argue that professional networks among firm counsel are likely to play a critical role in defining the future standards for law firm regulation and urge legal ethics scholars to collaborate with firm counsel in promoting the vibrancy of such networks.

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INTRODUCTION.....	1516
I. RESEARCH METHODS AND SAMPLE CHARACTERISTICS	1525
A. "Firm Counsel" as a Unit of Analysis	1526
B. The Structure of the Firm Counsel Position	1527
C. Firm Characteristics	1528
D. The Effect of Size	1529
II. WHO IS THE CLIENT?	1531
A. The Legal Inquiry	1533
B. The Sociological Inquiry	1542
III. THE NATURE OF FIRM COUNSELS' AUTHORITY	1549
A. In-Firm Practice as a Market	1552
B. The Expanding Role of Firm Counsel	1554
C. Sources of Authority	1555
IV. THE PROFESSIONALIZATION OF ETHICS?	1559
A. Respondents' Professional Commitments	1561
B. Lawyers' Tendency Toward Compliance	1563
C. "Ethics" v. "Risk Management"	1565
V. IMPLICATIONS	1568
VI. APPENDICES	1573

INTRODUCTION

There never was a general counsel at our firm before me. There was a person at the law firm who, if there was a problem, he would handle the problem. That was maybe three, four years ago.¹

In May 2004, Shearman & Sterling named John Shutkin of KPMG to be the law firm's first in-house general counsel.² Although by 2004 there was nothing surprising about a law firm appointing "general counsel,"³ it was noteworthy that Shearman & Sterling

1. Formal remarks of "O1," partner and general counsel at a large, New York City-based law firm, during a 2005 meeting of law firm in-house counsel. Further details about the meeting are withheld to preserve the speaker's anonymity. For an explanation of the notation used to identify confidential sources for this Article, see *infra* notes 55–56, 59–60.

2. Mary Mullally, *Analysis: The Adviser to the Advisers*, LEGAL WEEK, May 8, 2004, available at <http://www.legalweek.com/ViewItem.asp?id=20987> (reporting that Shutkin had been appointed). Shutkin started at Shearman & Sterling in September 2004. *Id.*

3. See Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 559–70 (2002) (examining the emergence of in-house counsel in thirty-two law firms); Jonathan D. Glater, *In a Complex World, Even Lawyers Need Lawyers*, N.Y. TIMES, Feb. 3, 2004, at C1 (reporting law firms' increasing reliance on in-house counsel); see also Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation*

appointed someone from outside its own ranks. In most law firms, the general counsel is a long-time partner who first played an informal advising role within the firm.⁴ In a 2005 survey of general counsel at Am Law 200 firms,⁵ all fifty-three general counsel who responded had been appointed from within their own firms.⁶

Even more newsworthy was the fact that Shutkin previously was general counsel at KPMG International.⁷ Prior to that, he was general counsel at Kodak Polychrome Graphics, and prior to that, he was deputy general counsel at KPMG (U.S.).⁸ Shutkin, in other words, was a career in-house general counsel. His cross-over appointment from accounting to law thus marked an important step in the professionalization of law firm in-house counsel: the appointment of a career specialist over a firm (or even industry) insider.

“Professionalization” refers to the process by which an occupational group becomes increasingly specialized, organized, and autonomous, developing distinct knowledge claims,⁹ titles,¹⁰

Debates, 33 FORDHAM URB. L.J. 119, 129 (2005) (noting the increasing use of the title “general counsel”).

4. See Chambliss & Wilkins, *supra* note 3, at 565 (emphasizing the “evolutionary” nature of the in-house position); Cathleen Flahardy et al., *Stepping Out: Partner. Law Firm GC. Consultant. Entrepreneur. Professional Poker Player. Five Options for Adventurous In-House Lawyers*, CORP. LEGAL TIMES, Nov. 2005, at 46, 50, available at www.insidecounsel.com/issues/insidecounsel/pdfs/SteppingOut2005.pdf (reporting that “firms usually promote from within” to fill the role of law firm general counsel). The position appears to be evolving the same way in UK firms. See Mullally, *supra* note 2 (reporting that “UK firms are increasingly appointing one dedicated person, usually a partner, to oversee risk and compliance issues on a full time basis”).

5. See ALTMAN WEIL, INC., RESULTS OF CONFIDENTIAL “FLASH” SURVEY ON LAW FIRM GENERAL COUNSEL 2 (2005), http://www.altmanweil.com/dir_docs/resource/d0f1e347-e90b-40ae-9b92-808a7eff6ffd_document.pdf [hereinafter FLASH SURVEY]. Am Law 200 firms are the 200 top-grossing United States law firms, as measured by the *American Lawyer Magazine*. See John O’Connor, *A Guide to Our Methodology*, AM. LAW., Aug. 2005, at 89, 89.

6. See Flahardy et al., *supra* note 4, at 50 (citing Ward Bower, the principal at Altman Weil who conducted the survey).

7. Lisa Lerer, *A Safe Pioneer*, AM. LAW., Oct. 1, 2004, at 32, 32 (stating that Shutkin had been general counsel at KPMG International).

8. Business Wire, *Shearman & Sterling Hires John Shutkin as General Counsel*, Jul. 15, 2004, http://www.prophet.net/quotes/stocknews.jsp?symbol=BE&article=20040715290.2_f30e0007a27acebd.

9. See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE EXPERT DIVISION OF LABOR* 33–113 (1988) (arguing that the professions develop through “jurisdictional” claims to exclusive competence); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 180 (1977) (arguing that “[t]he main instrument of professional advancement . . . is the capacity to claim esoteric and identifiable skills”).

associations,¹¹ and career tracks.¹² The so-called "strong" professions are those in which this process leads to market monopoly and self-regulation, such as medicine and law,¹³ but professionalization can be defined more broadly to refer to the emergence and institutionalization of any highly specialized, relatively autonomous occupational group.¹⁴ It is in this broader sense that I use the term here.

The emergence of in-house counsel in law firms began in the early 1990s¹⁵ under a variety of titles, such as "ethics advisor," "conflicts partner," "loss prevention partner," and "general counsel."¹⁶ Typically, the formal position grew out of a particular partner's informal role or leadership on a committee, such that the

10. See THEODORE CAPLOW, *THE SOCIOLOGY OF WORK* 139 (1954); Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137, 144 (1964) (emphasizing the importance of titles in the development of professional groups); see also Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 479 n.1 (1989) (noting the evolution of the title "corporate counsel" from "kept counsel" in the 1920s to "house counsel" in the 1930s to "corporate counsel" today).

11. See ABBOTT, *supra* note 9, at 83 (arguing that having "a single, identifiable national association" is a prerequisite of public and legal claims to exclusive jurisdiction over certain types of work, though not of workplace claims); ELIOT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* 186-87 (1986) (noting that "[t]he professional association is the most obvious manifestation of formal organization among professions").

12. See ABBOTT, *supra* note 9, at 129 (arguing that "[e]very profession has typical careers . . . one official pattern and a variety of unofficial ones"); Robert Rosen, Research Note, "Proletarianizing" Lives: *Researching Careers*, 33 LAW & SOC'Y REV. 703, 703, 710 (1999) (suggesting that the "proletarianization of the professional," which traditionally has been defined in terms of a loss of control over work, may also result from a loss of the ability to have "careers of certain kinds").

13. See RANDALL COLLINS, *THE CREDENTIAL SOCIETY: AN HISTORICAL SOCIOLOGY OF EDUCATION AND STRATIFICATION* 132-33 (1979) (defining "strong" professions).

14. See ABBOTT, *supra* note 9, at 7, 15 (criticizing the profession's literature for focusing too much theoretical attention on "the familiar examples of American law and medicine"). Abbott defines professionalization as the process by which occupational groups establish exclusive jurisdiction over certain types of work. *Id.* at 20; see also LARSON, *supra* note 9, at xvi (defining professionalization as "the process by which producers of special services [seek] to constitute and control a market for their expertise").

15. See Peter R. Jarvis, *Ethics Advisors Watch Over Firms*, NAT'L L.J., July 13, 1992, at 15; Daniel Kennedy, *New Trend is General Counsel in Firms*, A.B.A. J., Jan. 1995, at 29; Gary Taylor, *Counsel to Firms Goes In-House: Legal Costs Are Leading Firms, Like Their Clients, to Look Inside for Advice*, NAT'L L.J., July 18, 1994, at A1 (noting the emergence of law firm in-house counsel).

16. See Chambliss & Wilkins, *supra* note 3, at 565-66 (reporting the titles of in-house counsel in thirty-two law firms).

contours of the position varied significantly from firm to firm.¹⁷ However, most firm counsel focused primarily on keeping the firm “out of trouble;”¹⁸ that is, on promoting compliance with professional regulation,¹⁹ especially conflicts-of-interest rules.²⁰ Initially, most partners who served as firm counsel spent only a fraction of their time in that role and were not compensated directly for in-house service.²¹ As one such partner explained, “You’re expected . . . as a partner to pick up administrative duties around the firm, and that was one of the things I ended up doing.”²²

Over the past few years, the in-house position has begun to be institutionalized in large law firms, with a seeming coalescence around the title “general counsel.”²³ More firms are creating formal, compensated in-house positions,²⁴ and firm counsel are becoming more specialized, devoting an increasing percentage of their time to the in-house role.²⁵ Thirty-two percent of the general counsel

17. *Id.* at 565–69 (emphasizing the idiosyncratic development of the in-house position within firms). As one “ethics partner” noted, “Go to any firm around the country and you’ll find a different way in which the ethics function evolves in that firm, that’s consistent with that firm’s practice . . . structure . . . [and] culture . . .” *Id.* at 565.

18. *Id.* at 583 (quoting a full-time “special counsel” at a large Philadelphia firm).

19. *See id.* at 566–67 (examining the substantive jurisdictions of firm in-house counsel); Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 103, 108–11 (2000) (describing their own in-house practice at Stoel Rives, a Portland, Oregon firm).

20. *See* Chambliss & Wilkins, *supra* note 3, at 566–67 (reporting the centrality of conflicts issues).

21. *Id.* at 570–77 (examining the structure of the in-house position).

22. *Id.* at 572.

23. *See, e.g.,* Jeff Blumenthal, *Survey: More Firms Using Their Own GC*, LEGAL INTELLIGENCER, June 1, 2005, at 1; Leigh Jones, *More Firms Hire General Counsel: GCs Help Reduce the Risk of Liability*, NAT’L L.J., June 6, 2005, at 1; Jaime Levy, *More Firms See Benefit of Using In-House General Counsel*, CHI. LAW., July 2004, at 28; Jane Pribeck, *More and More Law Firms Designating Their Own ‘In-House’ General Counsel*, MINN. LAW., Sept. 26, 2005, at S-1 (special supplement); Nancy Rubin Stuart, *A Lawyer’s Lawyer: More Firms Establish In-House General Counsel Positions*, N.J. L.J., June 20, 2005, at 27; Charles Toutant, *General Counsel Posts Popping up at Large Firms, Spurred by Insurers*, N.J. L.J., Nov. 15, 2004, at 1; Peter D. Zeughauser, *A Lawyers’ Lawyer; Now That a Handful of Law Firms are the Size of Mid-Cap Corporations, They are Finding They Need a Dedicated General Counsel*, AM. LAW., Jan. 2004, at 51–52.

24. Sixty-nine percent of Am Law 200 firms surveyed in 2005 have in-house general counsel, up from 63% in 2004. *See* FLASH SURVEY, *supra* note 5, at 1. The average compensation for firm counsel in the 2005 survey was \$493,292, up from \$386,875 in 2004. *Id.* at 3.

25. The 2005 survey found that firm counsel devote an average of 753 hours per year on in-house matters, down slightly from 775 in 2004. *Id.* However, this slight decrease probably reflects the increasing number of new general counsel, rather than diminished investment on the part of existing general counsel. All the in-house counsel in my sample report that their role is expanding. *See infra* Part III.B. My findings on this point are consistent with recent news reports. *See* Carly McElligott, *Sincere Flattery*, CORP.

surveyed in 2005 were full-time in that role, up from 26% in 2004.²⁶ Firm counsel also are becoming more organized, thanks primarily to the efforts of insurers²⁷ and law firm consultants,²⁸ who have begun to sponsor roundtables and conferences for firm counsel. Some firm counsel list their membership in these specialized networks on their resumes.²⁹

From a regulatory standpoint, firms' increasing investment in firm counsel is a promising development. Initial research suggests that firm counsel tend to be strongly committed to ethics and regulatory compliance³⁰ and may play a significant role in promoting compliance procedures within firms.³¹ Not surprisingly, firm counsel who are compensated directly for in-house service tend to be more thorough and proactive than those who are not.³² Firm counsel who give up outside practice to focus exclusively on the firm's interests appear to be the most thorough and proactive of all.³³ Such findings

COUNS., Aug. 2005, at 21 (discussing part-time general counsel at Holland & Knight and Gibson Dunn); Pribeck, *supra* note 23 (discussing part-time general counsel at three Minneapolis firms).

26. See FLASH SURVEY, *supra* note 5, at 3.

27. See Chambliss & Wilkins, *supra* note 3, at 559–60 (noting the importance of the Attorneys' Liability Assurance Society ("ALAS") in promoting the appointment of "loss prevention counsel" within firms). ALAS holds a yearly conference for its loss prevention counsel, which provides an opportunity for firm counsel to meet and exchange information. *Id.* at 590.

28. The Hildebrandt Institute has been especially active in organizing events for "law firm general counsel." In addition to its Law Firm General Counsel Roundtable, which is an invitation-only event, Hildebrandt also sponsors an annual conference for law firm general counsel. See FOURTH ANNUAL LAW FIRM GENERAL COUNSELS' FORUM: THE CHANGING RISK ENVIRONMENT FOR LAWYERS AND LAW FIRMS (conference brochure on file with author). Some law firms that specialize in malpractice defense also sponsor conferences aimed in part at law firm general counsel. For instance, Hinshaw & Culbertson LLP sponsors an annual Legal Malpractice & Risk Management Conference directed at "Professional Liability Practitioners, Law Firm Managing Partners & General Counsel, In-House Corporate Counsel, and Legal Malpractice Insurance Professionals." See 2006 Legal Malpractice & Risk Management Conference, <http://www.lmr.com> (last visited Apr. 18, 2006).

29. For instance, Ronald E. Van Buskirk, Firm General Counsel at Pillsbury Winthrop Shaw Pittman, lists himself as a founding member of Hildebrandt's Law Firm General Counsel Roundtable. See Pillsbury Winthrop Shaw Pittman LLC, Professionals, Ronald E. Buskirk, <http://www.pillsburylaw.com/cgi-bin/bvisapi.dll/portal/ep/profDetail.do?bio=08957&tabId=3> (last visited Apr. 18, 2006).

30. See Chambliss & Wilkins, *supra* note 3, at 585–86 (examining the personal and professional characteristics of firm counsel).

31. *Id.* at 587–89 (examining firm counsels' strategies for promoting ethics and regulatory compliance).

32. *Id.* at 573–77 (examining the effects of direct compensation on the scope and substance of firm counsels' compliance efforts).

33. *Id.* at 580 (discussing the benefits of full-time firm counsel).

suggest that increased investment in the firm counsel position will bring increased attention to the compliance function.³⁴

As firm counsel become more specialized and develop their own professional networks, they also may become more independent from the interests of powerful partners and firms' immediate economic concerns.³⁵ Some firms already have moved to establish the structural independence of the position, by appointing firm counsel who are not partners³⁶ and do not sit on the management committee of the firm.³⁷ Shutkin, for instance, is not a partner.³⁸ According to David Heleniak, the senior partner at Shearman & Sterling, "[w]e thought it made sense to have an independent and fresh look at things, and we wanted to have somebody who was not otherwise engaged in the firm's business to do it."³⁹

34. See Elizabeth Chambliss, *MDPs: Toward an Institutional Strategy for Entity Regulation*, 4 LEGAL ETHICS 45, 61–62 (2002) [hereinafter Chambliss, *Entity Regulation*] (calling for the American Bar Association to promote the appointment of firm in-house counsel); Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 346–50 (2003) (arguing that the appointment of in-house counsel will improve law firm self-regulation); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1757–65 (2005) [hereinafter Chambliss, *In-Firm Privilege*] (explaining the benefits of firm counsel and arguing for broader protection of in-firm privilege).

35. Research in other organizational contexts finds that membership in active professional networks tends to boost the independence and authority of compliance specialists within organizations. See, e.g., CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* 174–79 (2002) (discussing the importance of professional networks for compliance specialists generally); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 412–45 (1999) (discussing the role of personnel professionals in promoting the adoption of non-union grievance procedures within organizations).

36. See Chambliss & Wilkins, *supra* note 3, at 573 (discussing a respondent who had “given up [his] rights to be compensated like a partner” in order to clarify his role as firm counsel); Mullally, *supra* note 2 (discussing the pros and cons of firm counsel having partnership status); Ed Thornton, *A New Breed of Adviser*, LEGAL DIRECTOR, Sept. 6, 2005, <http://www.legalweek.com/ViewItem.asp?id=24459> (discussing Shutkin's appointment). On the other hand, the 2005 survey of Am Law 200 firms found that the percentage of firm counsel who are partners had gone up since 2004, from 83% to 92%. See FLASH SURVEY, *supra* note 5, at 2.

37. See FLASH SURVEY, *supra* note 5, at 5 (finding that 26% of firm counsel serve on their firm's governing committee, down from 40% in 2004). Firms' efforts to establish the structural independence of the in-house position are driven in part by their concerns about preserving the attorney-client privilege for communication between firm counsel and other members of the firm. See Thornton, *supra* note 36 (quoting Ward Bower regarding firms' concerns about privilege).

38. See Mullally, *supra* note 2 (quoting Shutkin). As Shutkin says, “I'm not doing this role pro bono, but my compensation is not tied to the financial wherewithal of the firm” *Id.*

39. Lerer, *supra* note 7, at 32 (quoting Heleniak).

At the same time, there may be limits to the authority and effectiveness of specialized, full-time firm counsel. Some question whether full-time firm counsel can command the respect of practicing partners, especially on questions of business intake.⁴⁰ Although law firm management has become more bureaucratic as firms have grown,⁴¹ many firms continue to be dominated by “partners with power”⁴²—that is, the partners who control the most business—despite the constraints this imposes on risk management and strategic planning.⁴³ Telling a powerful rainmaker that he cannot bring in a big client may be difficult for someone without an equity stake in the firm.⁴⁴ Firm counsel who come from outside, in particular, may have trouble establishing their credibility and authority with other lawyers in the firm.⁴⁵

Further, as law firms begin to recruit from outside, firm counsels’ personal and professional commitments may change. In addition to becoming more independent, firm counsel may become more detached, and less invested in the fortunes and reputation of the firm. Whereas the first wave of firm counsel “grew up” in their firms,⁴⁶ and many volunteered hundreds of hours of in-house service as a “labor of love,”⁴⁷ outsider firm counsel may be more likely to approach the firm at arm’s length and to identify primarily with other firm counsel

40. See Chambliss & Wilkins, *supra* note 3, at 581 (quoting several part-time firm counsel on this point).

41. See ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 86–124 (1988) (discussing law firms’ increasing tendency toward bureaucratic organization and management).

42. *Id.* at 5 (introducing this phrase).

43. *Id.* at 224–25 (stating that “[b]ureaucratization in the law firm will always be subject to the prerogatives of the client-responsible elite”). Although Nelson’s classic study is almost twenty years old, the basic tension he identified persists. See Chambliss, *supra* note 3, at 120–21 (discussing lawyers’ resistance to bureaucratic management); Jonathan E. Smaby, *Kicking the Habit of a Reactive Approach*, NAT’L L.J., Aug. 16, 2004, at S3 (criticizing lawyers’ resistance to centralized management and strategic planning).

44. See Chambliss & Wilkins, *supra* note 3, at 581 (discussing some potential drawbacks of full-time in-house practice).

45. See *id.* at 581 (quoting a part-time firm counsel who said it would take “fifteen years” for an outsider to build credibility in the firm); Flahardy et al., *supra* note 4, at 4 (quoting Richard Goshorn, general counsel at Akin, Gump, Strauss, Hauer & Feld, as saying, “I’ve heard people say ‘there’s no way you can come from outside and do this job’”).

46. See Chambliss & Wilkins, *supra* note 3, at 581 (reporting that most of the full-time firm counsel in the study “grew up” practicing in their firms and thus came into the position with personal credibility).

47. *Id.* at 585 (reporting that several volunteer, part-time firm counsel described their services as a “labor of love”). As one volunteer said, “It’s something of a personal commitment that keeps my door open, effectively, for people to come to my office.” *Id.*

rather than other lawyers in their firms.⁴⁸ To the extent that such changes occur, how will they affect the scope and quality of compliance efforts within firms?

This Article examines the structural evolution of the firm counsel position and considers the likely effects of continuing professionalization. Based on focus groups and interviews with firm counsel, as well as participant observation at meetings and conferences for firm counsel, I compare the professional orientations of part-time versus full-time firm counsel; and full-time firm counsel appointed from inside versus outside the firm.

My comparative analysis is organized around three sets of questions. First, who is the client? How do firm counsel define their loyalties and with whom do they primarily interact? Partners? Associates? Management? Staff? Do firm counsel clearly perceive the firm (versus individual lawyers) as the client? To what extent do firm counsel identify with other lawyers in the firm?

Second, what is the nature and extent of firm counsel's authority? Do most firm counsel perceive themselves as having authority over powerful partners? How do firm counsel measure their authority and what do they identify as its sources? How do firm counsel define the qualities needed to be effective in their role(s)?

Finally, how do firm counsel define their role in promoting compliance with ethics rules and other professional regulation? Do firm counsel view unethical conduct to be a serious issue within the firm? What types of ethical and regulatory issues do firm counsel consider to be the most serious or difficult to address?

The analysis builds on a 2002 article about the emergence of in-house counsel in law firms⁴⁹ and is intended as a follow-up to that article. Part I describes my research methods and the characteristics of firm counsel in the sample. Parts II through IV present the findings on the three questions outlined above.

Overall, I find the professionalization of firm counsel to be a positive development. Certainly firms' increasing investment in firm counsel is a positive development. Most evidence suggests that law

48. See Jack Haas & William Shaffir, *Ritual Evaluation of Competence: The Hidden Curriculum of Professionalization in an Innovative Medical School Program*, 9 WORK & OCCUPATIONS 131, 132 (1982) (defining professionalization as a process that involves several dimensions, including "developing greater loyalty to colleagues than to clients").

49. See generally Chambliss & Wilkins, *supra* note 3 (examining the emergence of in-house counsel in a sample of thirty-two law firms).

firms invest too little in self-regulation⁵⁰ and that ethical controls in large law firms tend to be “remarkably weak.”⁵¹ Against this backdrop, appointing a specialist to be responsible for compliance represents an important step toward accountability by firm management.⁵² In the words of one observer: “[h]aving responsibility with one individual is highly preferable to nobody being ultimately responsible.”⁵³

Moreover, although they tend to speak in terms of “risk” and “risk management” rather than “ethics” and “compliance,” most professional firm counsel appear strongly committed to promoting internal accountability and protecting the firm; and most perceive themselves to be effective in this role. Full-time firm counsel who “grew up” in their firms report that they are able to draw on their personal history with firm members to maintain their credibility and authority after they relinquish outside practice. Full-time firm counsel appointed from outside the firm report other viable sources of authority, such as membership in external networks made up of insurers and other firm counsel. Although it is still early days for outside appointments, and there are not many examples to study, so far there is little evidence that outsiders necessarily lack authority within the firm.

There does appear to be a trade-off between the outside appointment of firm counsel and firm counsel’s jurisdiction over sensitive issues such as conflicts and client intake. Although long-term partners who serve as firm counsel tend to have a proprietary attitude toward the firm, which arguably compromises their

50. See Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 696–702 (2002) (reviewing research on the prevalence and effectiveness of ethical infrastructure in law firms); Douglas N. Frenkel et al., *Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 FORDHAM L. REV. 697, 704–05 (1998) (summarizing the main findings of a study of legal ethics among large-firm litigators).

51. Marc C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 858 (1998) (reporting on the results of focus groups with large firm litigators). According to one associate in the study:

I’ve worked at two firms, and I think that in both firms, certainly, you would be encouraged to bring anything that you felt was a clear problem to the right place—although, quite frankly, I couldn’t tell you what the right place was, in either of those firms, because they didn’t designate anyone in particular, to my knowledge.

Id. at 859.

52. See Chambliss, *supra* note 3, at 129–36 (arguing that the role of firm counsel should be compared to realistic alternatives, rather than being compared to a nostalgic, collegial ideal).

53. Thornton, *supra* note 36 (quoting Ward Bower).

independence as firm counsel, this proprietary attitude often goes hand-in-hand with special access and personal authority on sensitive and strategic issues. Firms that are able to fill the role of firm counsel with a powerful insider appear to prefer to do so.

Firm counsel hired from outside, by contrast, tend to have a broader but more legalistic mandate, verging on the administrative, which in time could end up weakening the collective professional authority of firm counsel. In Part V, I suggest some strategies for promoting the authority of firm counsel and the vibrancy of their external networks; and for improving collaboration between insurers, academics, and firms.

I. RESEARCH METHODS AND SAMPLE CHARACTERISTICS

My analysis is based on an ongoing qualitative study of law firm in-house counsel.⁵⁴ The first stage of the study consisted of focus groups⁵⁵ and interviews⁵⁶ with firm counsel in a nonrandom sample of thirty-two law firms.⁵⁷ This research was conducted between May

54. For an early description of the overall research agenda, see Chambliss & Wilkins, *supra* note 50, at 702–16 (explaining the theoretical foundations of the study, the primary research questions, and initial hypotheses). For a more recent statement focusing specifically on the role of firm counsel, see Chambliss, *supra* note 3, at 138–41, 145–51 (discussing variables of interest).

55. We conducted three focus groups involving ten to fifteen participants each. Participants included bar regulators, academics, and outside lawyers who specialize in professional liability matters, as well as firm counsel and their functional equivalents in twenty-nine law firms. Each focus group began with an informal dinner for participants, followed the next day by two formal sessions lasting 90–120 minutes each. See Chambliss & Wilkins, *supra* note 3, at 561 n.15 (describing the focus groups). As in the initial analysis, I label the three focus groups A, B, and C, and refer to participants in each focus group by a unique number (e.g., A1, A2, B1, etc). *Id.* Citations are provided for previously published remarks.

56. We supplemented the focus group data with follow-up interviews with some participants. The initial sample also includes three respondents who did not participate in the focus groups, but whom I interviewed individually by telephone. These interviews lasted thirty to sixty minutes each. *Id.* at 561 n.16. I refer to these interview-only subjects as IA, IB, and IC, to distinguish them from the interview subjects in the second stage of the study. See *infra* note 59. In the initial analysis, we referred to the three interview-only subjects as I1, I2, and I3. See Chambliss & Wilkins, *supra* note 3, at 561 n.16. Citations are provided for previously published remarks.

57. The initial sample can best be described as a “snowball” (or “reputational”) sample, in which we asked a few bar leaders and ethics specialists known to us to recommend participants for the study; then asked these participants for more names, and so on; until we felt we had enough data to present interesting preliminary findings. *Id.* at 561–62 (describing the 2001 sample). See generally Leo A. Goodman, *Snowball Sampling*, 32 ANNALS OF MATHEMATICAL STAT. 148 (1961) (explaining snowball sampling); Charles Kadushin, *Power, Influence and Social Circles: A New Methodology for Studying Opinion Makers*, 33 AM. SOC. REV. 685, 694–96 (1968) (discussing the strengths and weaknesses of snowball sampling).

2001 and March 2002.⁵⁸ The second stage of the study consisted of interviews with firm counsel at twelve additional law firms⁵⁹ and participant observation at meetings and conferences where panels of firm counsel discussed their roles.⁶⁰ These interviews and observations took place in 2005. Altogether, the combined sample includes forty-eight firm counsel representing forty-seven firms.⁶¹ Appendix A reports the characteristics of respondents and firms in the sample.

A. *"Firm Counsel" as a Unit of Analysis*

The first stage of the study focused on the emergence of a formal, specialized position from what typically had been a committee or informal assignment.⁶² We therefore defined our unit of analysis in broad, functional terms, referring to respondents as "in-house compliance specialists" regardless of their actual titles.⁶³ Of the thirty-two respondents in the initial sample, the most popular titles were "firm counsel," "general counsel," or "counsel to the firm" (ten respondents), followed by "ethics partner," "ethics adviser," or "professional responsibility advisor" (seven respondents).⁶⁴

As the role of law firm in-house counsel has expanded and begun to be institutionalized within firms, I have begun to use the label "firm counsel" to refer to my unit of analysis, in part to distinguish in-house counsel in law firms from in-house counsel in corporations,⁶⁵ and in part because the centrality of the compliance function has turned out to be an important empirical question. However, my unit of analysis has not changed. Of the forty-eight respondents in the

58. See Chambliss & Wilkins, *supra* note 3, at 562.

59. These interviews were secured through a variety of methods. I knew most of the respondents from previous research or personal contact at conferences; some I met through email exchanges on the Association of Professional Responsibility Lawyers ("APRL") listserv. The interviews were conducted by telephone and lasted sixty to ninety minutes. I also gathered some initial and follow-up information via email. I refer to the 2005 interview subjects with the letter I and a unique number (I1, I2, etc).

60. I observed two panels involving a total of seven firm counsel, three of whom I also interviewed by telephone. For notation purposes, those three are treated as interview subjects. I refer to the firm counsel whom I observed, but did not interview, with the letter O and a unique number (O1, O2, etc).

61. One of the focus group participants practiced in the same firm as one of the firm counsel interviewed in 2005.

62. See Chambliss & Wilkins, *supra* note 3, at 565–70, 578–80 (discussing the evolution of the firm counsel position).

63. *Id.* at 563–70 (defining "in-house compliance specialist" as a unit of analysis).

64. *Id.* at 565–66 (reporting respondents' titles).

65. See generally Chambliss, *In-Firm Privilege*, *supra* note 34 (analyzing the scope of the attorney-client privilege as applied to in-house counsel in law firms).

combined sample, most go by the title “firm counsel,” “general counsel,” or “counsel to the firm” (nineteen respondents), followed by “ethics partner,” “ethics adviser,” or “professional responsibility advisor” (ten respondents). The rest have a variety of titles, such as “conflicts partner,” “loss prevention partner,” and “risk management partner,” and many have more than one title indicating an in-house role (for instance, “loss prevention partner” and “chair, professional responsibility committee”).

As was the case in the initial sample, respondents’ titles do not reliably indicate the structure or function of their in-house role.⁶⁶ For instance, nineteen respondents have titles indicating that they are the chair, co-chair, or a member of a committee, such as the ethics or conflicts committee; for twelve respondents, this is their only title. However, the fact someone is the chair of a committee (rather than, say, “general counsel”) does not necessarily mean that the person devotes less time to in-house matters or focuses only on the named function of the committee. Two respondents whose formal title is “chair, ethics committee” are full-time in that role and handle a wide variety of matters for the firm, including claims. Likewise, some “general counsel” are part-time in that role and may not be responsible for some aspects of ethics and regulatory compliance.⁶⁷

That being said, a comparison of titles in the 2001–02 and 2005 samples suggests a move toward single titles with the word “counsel” in them, such as “firm counsel,” “general counsel,” and “special counsel,” which is consistent with recent media and professional usage.⁶⁸ Nine of the sixteen respondents in the 2005 sample have “counsel” in their title (56%) compared to ten of thirty-two respondents in the 2001–02 sample (31%).⁶⁹

B. The Structure of the Firm Counsel Position

Fifteen respondents in the combined sample are full-time firm counsel, or 31%, the same percentage as in the initial sample.⁷⁰ Among part-time firm counsel, eleven are compensated directly for

66. See Chambliss & Wilkins, *supra* note 3, at 566–69 (examining the relationship between title, structure, and function).

67. See, e.g., FLASH SURVEY, *supra* note 5, at 9 (reporting that only 82% of “general counsel” in Am Law 200 firms advise their firms on professional responsibility issues, defined as “conflicts, client privilege, etc.”).

68. See *supra* note 23 and accompanying text.

69. See Appendix A.

70. See Chambliss & Wilkins, *supra* note 3, at 573. This figure is consistent with that reported in the 2005 survey of Am Law 200 firms. See FLASH SURVEY, *supra* note 5, at 3 (reporting that 32% of respondents were full-time general counsel).

their in-house service (for instance, by billing the firm as a client) and twenty-one are not.⁷¹ Thus, 34% of part-time firm counsel in the combined sample are compensated directly, up from 24% in the initial sample.⁷²

Only five respondents in the combined sample were appointed from outside the firm: four full-time firm counsel and one part-time firm counsel, up from one each in the initial sample. Moreover, in one case, the person appointed had "grown up" in the firm, but left for fifteen years to pursue an academic career. [IB].⁷³ In another case, the person initially joined the firm as a partner, and shortly thereafter was appointed as ethics partner on a part-time, compensated basis. [A14]. Thus, although I coded both as "outsiders," they are to some extent hybrids.

Obviously, five is a small sample from which to draw conclusions (or even, perhaps, speculations). Thus, I offer my findings about outside appointment with the utmost modesty. That being said, at the time of this writing there appear to be few (if any) other outside appointments in the population.⁷⁴ As to this group, therefore, I believe that my sample is, at least, highly representative.

C. *Firm Characteristics*

The firms in the sample range in size from thirty-five to 1,000-plus lawyers and are headquartered in sixteen different cities. The average size of firms in the combined sample is 532 lawyers, down from 611 lawyers in the initial sample. The breakdown of firms by size category is: 35–150 lawyers (eight firms); 151–250 lawyers (seven firms); 251–500 lawyers (twelve firms); 501–999 lawyers (thirteen firms); 1,000-plus lawyers (seven firms). Most firms are headquartered on the East Coast (thirty-one firms) or in the Midwest

71. Information for one respondent is missing. See Appendix A.

72. We initially reported compensation data for twenty-nine respondents, excluding one retired firm counsel, one associate being groomed as firm counsel, and one respondent for whom compensation data are missing. See Chambliss & Wilkins, *supra* note 3, at 573 n.47. The figures reported here include the retired firm counsel and the associate, neither of whom is (or was) compensated directly.

73. *Id.* at 582.

74. See *supra* note 6 and accompanying text (noting that all fifty-three general counsel who responded to a survey of Am Law 200 firms had been appointed from within the firm).

(eleven firms).⁷⁵ The location of firms is similar to those in the initial sample.⁷⁶

D. *The Effect of Size*

To some extent, of course, the structure of the firm counsel position depends on firm size, with larger firms investing more in the position than smaller firms. Appendix B provides a list of respondents by firm size and structure of position. The average size of the firms in the sample with full-time firm counsel is 920 lawyers; the average size of firms with part-time, compensated firm counsel is 525 lawyers; and the average size of firms with uncompensated firm counsel is 368 lawyers. These figures are roughly comparable to those of the initial sample.⁷⁷

As we noted in our initial analysis, however, size is not the only important determinant of firms' level of investment.⁷⁸ When the in-house position was in its infancy, and not yet institutionalized within firms, firms' investment appeared to turn primarily on partners' appetite for centralized management⁷⁹ and perhaps the identity of the firm's insurer.⁸⁰ As one respondent in the initial sample observed, "The decision as to how to deal with ethical issues in our firm is not dictated by the quantum of the work." [B2].⁸¹ If anything, the opposite is true. Several respondents who moved from part-time to full-time positions reported that the work expanded rapidly to fill the available time.⁸² Said one respondent, "I don't know how they managed without me!" [A9].⁸³

75. The cities with more than one firm in the sample are New York City (twelve firms), Boston (nine), Chicago (five), Philadelphia (four), Minneapolis (three), Washington, D.C. (three), and St. Louis (two).

76. See Chambliss & Wilkins, *supra* note 3, at 561 nn.17-18.

77. In the initial sample, the average size of firms with full-time firm counsel was 988 lawyers; the average size of firms with part-time, compensated firm counsel was 574 lawyers; and the average size of firms with uncompensated firm counsel was 404 lawyers. In our initial analysis, we reported the average size of firms with uncompensated firm counsel as "roughly 350 lawyers." See *id.* at 576. However, this figure excluded two firms that I am including here, and thus is not directly comparable. See *supra* note 72.

78. See Chambliss & Wilkins, *supra* note 3, at 570-77 (noting the limited importance of organizational imperatives such as size).

79. *Id.* at 570-72 (emphasizing the importance of the firm's management philosophy).

80. *Id.* at 559-60, 590 (noting the role of ALAS in promoting the appointment of "loss prevention counsel" within firms).

81. *Id.* at 577.

82. *Id.* at 576-77. As one respondent noted:

The thing I notice is, there's a lot more business now that we have made a resource available [W]e used to have a system where two of us would spend about 500 hours a year on conflicts, and maybe a third of that time on other professional

Moreover, as the position of firm counsel becomes increasingly prevalent within firms, it is likely to become increasingly standardized in its formal title and structure,⁸⁴ as is already occurring,⁸⁵ such that variation by firm size will diminish. A key premise of this Article is that firms are coalescing around a full-time, general counsel model, with increasing structural (and ideological?) separation from partners. Indeed, movement towards this “professional” model appears almost inevitable, given the evolution of the managing partner position⁸⁶ and the increasing bureaucratization of law firm management generally.⁸⁷

responsibility matters. Now, in my new [full-time] position, I am astounded that I can't get everything done in a day and I don't think there are a lot of different issues than there used to be when we spent 1,000 hours on this. [A11].

Id. at 577.

83. *Id.*

84. Research shows that organizations in the same institutional environment tend to become increasingly structurally similar to each other over time. Sociologists refer to this process as “institutional isomorphism.” See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 147–49 (1983) (defining “institutional isomorphism”). For a review of research on the diffusion of compliance structures within organizations, see Lauren B. Edelman & Marc C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 496–501 (1997). For an application of institutional theory to the development of ethical infrastructure in law firms, see Chambliss, *Entity Regulation*, *supra* note 34, at 56–65; Chambliss, *supra* note 3, at 138–41; Chambliss & Wilkins, *supra* note 50, at 707–16.

85. See *supra* note 23 and accompanying text.

86. As law firms have grown, law firm management generally has become more professionalized, with an increasing division between practice and management roles. Although some large law firms continue to be led by practicing partners, in most large firms, being managing partner is recognized as a full-time job, if not the start of a new career. See Mike France, *Managing Partner: The Tender Trap*, NAT'L L.J., Feb. 6, 1995, at A1 (“[A]lmost all [large firms] have one full-time (or nearly full-time) leader who sets strategy, speaks to the press and hires lateral partners.”); James Jones & Carl Leonard, *The Price of Leadership: A New Look at Setting Compensation for Managing Partners*, N.Y. L.J., Sept. 10, 2002, at 5 (noting that “in larger firms . . . the managing partner’s job is usually a full-time position”). Some firms have begun to send their managing partners for special training at elite business schools. See Leigh Jones, *Training Leaders a Top Priority: Merged Firms Bring New Challenges*, NAT'L L.J., July 18, 2005, at 1 (describing law firm management training programs at Harvard Business School, University of Pennsylvania’s Wharton School of Business, and Northwestern University’s Kellogg School of Management).

87. Bureaucracies and professions are “distinct but nevertheless complementary modes of work organization.” LARSON, *supra* note 9, at 199. Both reflect a process of “rationalization.” See David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1837 n.293 (1989); George Ritzer, *Professionalization, Bureaucratization and Rationalization: The Views of Max Weber*, 53 SOC. FORCES 627, 632 (1975). Indeed, I could have titled this paper “The Bureaucratization of Law Firm In-House Counsel,” without altering the focus of the paper very much. See Elizabeth Gorman, *Explaining the Spread of Law Firm In-House Counsel Positions: A Response to Professor Chambliss*, 84 N.C. L. REV. 1577, 1579–82 (2006)

Thus, firm size is less important to my analysis than it might first appear. Although size clearly plays a role in defining firms' institutional communities—that is, the firms they look to for comparison and with which they compete—I posit that over time firm size will begin to operate more like a categorical than a linear variable, with most firms over a certain size having full-time general counsel.⁸⁸ As one law firm consultant predicts, “we expect to see virtually all major [U.S.] firms with designated general counsel in the near future.”⁸⁹ A British consultant makes a similar prediction for the top London firms.⁹⁰

My questions are how firms' increasing reliance on professional firm counsel will affect the scope and substance of compliance efforts within firms, and what limitations, if any, there are on the development of firm counsel as an autonomous professional group. The next Part begins to investigate these issues by examining how firm counsel define “the firm” as a client, and what these orientations reveal about their role(s) within firms.

II. WHO IS THE CLIENT?

The question “who is the client?” has both a legal and a sociological component. As a legal inquiry, it is a question about firm counsel's professional responsibilities under Model Rule 1.13 (Organization as Client),⁹¹ and the scope of the attorney-client privilege for communication between firm counsel and other members of the firm.⁹² In the initial sample, there appeared to be some confusion and internal division among respondents about the professional responsibilities of firm counsel, including the identity of the firm as the client.⁹³ Early cases testing the scope of in-firm privilege also indicated some confusion within law firms about the

(using this phrase). I focus on “professionalization” because I am interested in the organization and power of firm counsel as a group, as well as in their individual and collective role within firms.

88. See Gorman, *supra* note 87, at 1584 (noting that “[a]s firm counsel positions become more legitimate and institutionalized, it may become the case that any firm that wants to be seen as a serious player will have to have one”).

89. Thornton, *supra* note 36 (quoting Ward Bower of Altman Weil).

90. Mullally, *supra* note 2 (quoting Olivia Burren of The St. Paul). According to Burren, “Increasingly, City firms are appointing risk and compliance managers to take away the work load from partners. I predict that in the next three to four years all of the top fifty firms will have someone in that position.” *Id.* (internal quotations omitted).

91. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003).

92. See generally Chambliss, *In-Firm Privilege*, *supra* note 34.

93. *Id.* at 1762 (reporting that our initial study “revealed several questions on this front”).

professional responsibilities of partners who also act as firm counsel.⁹⁴ Part II.A reports on my efforts to follow up on these issues.

As a sociological inquiry, "who is the client?" is a question about firm counsels' loyalties and their day-to-day function in the firm. For instance, whom do firm counsel serve and with whom do they interact? Do firm counsel focus primarily on partners' concerns about conflicts and intake? Or are they available to other groups such as associates and staff? To what extent do firm counsel identify professionally with partners? I address these questions in Part II.B.

I find that professionalization of firm counsel has contributed to the clarification of firm counsels' legal and professional duties to the firm. Indeed, to some extent, the professionalization of firm counsel has been driven by the need for such clarification. Firms' interest in preserving the privilege for communication with firm counsel has contributed to the increasing formalization of the firm counsel position and the increasing structural separation of firm counsel from partners. These developments, in turn, have helped to highlight the boundaries between the role of firm counsel and that of other lawyers in the firm.

The price of this clarification, however, may be the increasing detachment of firm counsel from the most sensitive ethical and strategic issues within the firm. Firm counsel hired from outside, in particular, appear to interact less with partners and more with central management and administrative staff. They also may be more likely than insiders to act primarily as technical advisors and leave normative and strategic questions to management. Of course, with only five outsiders in the sample, my findings on this point are highly speculative. Moreover, some of the detachment that I observe may simply be a byproduct of the expansion of the firm counsel position, rather than some kind of cultural or ideological response on the part of partners or firm counsel. Nevertheless, my findings are suggestive and may have important implications for the future role of firm counsel.

94. See *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996) (noting the district court's concerns on this point); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 572, n.35 (E.D. Pa. 1989) (criticizing the firm for failing to distinguish between the lawyers acting as firm counsel and the lawyers acting as clients); Chambliss, *In-Firm Privilege*, *supra* note 34, at 1732-33, 1750-51 (emphasizing the need to formally define firm counsel's role before the communication at issue occurs).

A. *The Legal Inquiry*

The Model Rules of Professional Conduct make it sound easy. Who is the client? Answer: the firm. As Rule 1.13(a) states, “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”⁹⁵ In practice, of course, as the experience of corporate counsel suggests,⁹⁶ questions about the identity of the client are more difficult to resolve. For instance, who speaks for the client? If there is conflict within the management, whose instructions prevail?⁹⁷ When is corporate counsel acting as an attorney for purposes of the attorney-client privilege,⁹⁸ rather than in some other capacity, such as a businessperson?⁹⁹ In an internal investigation, when must corporate counsel warn potentially cooperative witnesses—or wrongdoers—that counsel represents the firm, rather than their individual interests (the so-called “corporate Miranda”)?¹⁰⁰

95. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2003).

96. See generally JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES § 3 (2005) (“Ethical Issues for Inside Counsel”). I focus on corporate counsel because that is the group to whom firm counsel compare themselves. However, government lawyers face many of the same problems, plus their own unique challenges. See, e.g., Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 797–802 (2000) (discussing the difficulties of identifying the client of the government lawyer).

97. See, e.g., *In re Davis*, No. 96-O-04662, 2003 WL 21904732, at *4 (Cal. Bar Ct. Aug. 6, 2003) (disciplinary proceeding against corporate counsel who failed to obtain written permission for continued representation after a dispute arose among the board). See generally William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent? An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003) (criticizing existing approaches to this question).

98. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) (“[T]he attorney-client privilege may be invoked ... with respect to ... (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”).

99. See, e.g., *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, No. 93 Civ. 5125 (RPP), 1996 WL 29392, at *4 (S.D.N.Y. Jan. 25, 1996) (finding negotiation of environmental provisions in a contract to be outside a lawyer's “traditional function”); *Gen. Foods Corp. v. Jay V. Zimmerman Co.*, No. 86 Civ. 2697 (KLB), 1988 WL 5371, at *1 (S.D.N.Y. Jan. 14, 1988) (denying the privilege where attorney was acting as a business adviser); JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE §§ 3.21–30 (2003) (summarizing the factors that courts consider in determining whether in-house counsel was acting as a lawyer for the purpose of the privilege).

100. See MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (requiring the lawyer to explain the identity of the client “when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing”); Paul M. Koning, *Legal Ethics for In-House Counsel: Selected Issues*, 59 TEX. B.J. 22, 23 (1996) (referring to this concept as the “corporate ‘Miranda’”); Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding*

Such questions are especially tricky for firm counsel for several reasons. First, unlike corporate counsel, who are formally hired for that position from outside the organization, most firm counsel emerge from within the existing partnership and take on the role of "firm counsel" in a gradual manner, as their titles reflect.¹⁰¹ Thus, as a threshold matter, it may be difficult to determine when a partner is acting as firm counsel, such that a lawyer-client relationship is established, and when a partner is simply giving advice or instructions as a colleague or supervisor. After all, in a law firm, most people getting and giving advice are lawyers. What distinguishes the lawyer-client relationship from ordinary collegial communication?¹⁰²

Law firms also tend to be less hierarchical than corporations,¹⁰³ and lawyers tend to be less observant of the formal hierarchies that do exist.¹⁰⁴ Powerful partners may be able to circumvent formal management controls,¹⁰⁵ and even partners who cooperate with management tend to retain significant autonomy in their day-to-day work.¹⁰⁶ Thus, unlike corporate counsel, who typically answer to the

Role of the Attorney-Employee, 39 S. TEX. L. REV. 497, 503 (1998) (noting that the nature and scope the required warning "is not always clear").

101. See Chambliss & Wilkins, *supra* note 3, at 565–69 (examining the emergence of the firm counsel position and reporting a weak relationship between title and function).

102. Courts were initially reluctant to recognize the attorney-client privilege for communication between firm counsel and other members of the firm, noting that such a privilege potentially would cover every communication in a law firm. See *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996) (noting the district court's concerns on this point); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 572 (E.D. Pa. 1989) (criticizing the firm for failing to distinguish between the lawyers acting as firm counsel and the lawyers acting as clients); Chambliss, *In-Firm Privilege*, *supra* note 34, at 1728–33 (discussing the initial cases on in-firm privilege).

103. See NELSON, *supra* note 41, at 207–14 (discussing the relative lack of rules and formal hierarchy in law firms). As one respondent put it, "Law firms are more fluid, traditional, murky, than corporations where there are rules of governance." [I1].

104. Witness the hackneyed comparison of law firm management to "herding cats." See, e.g., Holly English, *Values at Work: How Strong Core Values Can Make Your Firm More Successful*, N.J. L.J., Oct. 18, 1999, at 207 (using this phrase); Richard Gary, *So You Think You Want to be Chair; 10 Questions to Ask Yourself—And the Firm—Before You Make the Leap into Firm Management*, LAW FIRM INC., Jan. 13, 2005, at 23, 25 (characterizing this phrase as demeaning to lawyers, "albeit in a good natured way"). A LEXIS search of this phrase yields sixty-three hits from American Lawyer Media alone.

105. See, e.g., Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 715 (1997) (finding that "in some firms, powerful partners routinely bypass work assignment systems and directly recruit the associates with whom they want to work ('poaching')").

106. See Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 284–85 (1996) (reporting the results of a study of peer review procedures in 191 law firms); Douglas N. Frenkel, *Ethics: Beyond the Rules—Questions and Possible Responses*, 67 FORDHAM L. REV. 875, 878–79 (1998) (discussing the lack of "horizontal monitoring"

chief executive officer or some other individual in a well-defined vertical hierarchy,¹⁰⁷ firm counsel potentially answer to every partner in the firm. As one respondent put it, “you’ve got 150 clients right there in the building . . .” [C2].¹⁰⁸ According to Edward Zulkey, general counsel at Baker & McKenzie since 1994, “every partner believes that I answer to them. In that way, the constituency that I serve is far broader [than in a corporation].”¹⁰⁹

Finally, in many firms, the role of firm counsel grew out of a proprietary, pastoral role, in which a trusted partner made himself available to answer sensitive questions on a sometimes confidential basis. The partners who did this were able to balance their sense of responsibility to the individual lawyer with their sense of responsibility to the firm without appealing to the formal rules governing lawyer-client relationships. As one partner and part-time firm counsel put it, “these are my guys.”¹¹⁰ The vestiges of this informal role, and the confidence that it is possible to mediate between the interests of individual lawyers and those of the firm, provide a powerful alternative model to that specified by Rule 1.13.

These issues tend to be the most difficult during the early development of the firm counsel position, such as just after the position is formalized; or where the partner who serves as firm counsel does so on a volunteer basis (and therefore does not specifically record or bill time the spent on in-house matters).¹¹¹ For instance, the following statement comes from a partner who had just taken on the role of full-time general counsel in her 100-lawyer firm:

among partners); Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 *FORDHAM L. REV.* 809, 825 (1998) (quoting a partner who said “[o]ne doesn’t monitor one’s partners”).

107. See ASSOCIATION OF CORPORATE COUNSEL, *ACCA CENSUS OF U.S. IN-HOUSE COUNSEL* 7–8 (2001) (reporting that roughly 60% of general counsel report to the chief executive officer of the corporation, and about 30% report to the president or another executive); see also EVE SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* 74–75 (1986) (discussing the internal structure of most corporate law departments, whereby staff counsel answer to the general counsel in a kind of “benevolent dictatorship”).

108. Chambliss & Wilkins, *supra* note 3, at 586.

109. Flahardy et al., *supra* note 4, at 50 (quoting Zulkey) (alteration in original).

110. Remarks from the floor of a conference. The partner who made this remark was defending his practice of promising confidentiality to individual lawyers in his capacity as firm counsel despite the potential tension between this promise and the duties imposed by the Model Rules. See *infra* notes 115–18 and accompanying text.

111. See Chambliss, *In-Firm Privilege*, *supra* note 34, at 1749 (arguing that direct compensation “is the clearest way to demarcate the role of firm counsel”).

Somebody comes in and reports to you; do you document or do you not? I mean, do you use e-mail? I hate e-mail. I don't want anything on the system Do you give—do you have a little sign that says, I'm the firm's lawyer, not yours? . . . If I get a sexual harassment complaint . . . what role am I doing? I think there are a lot of questions [A13].¹¹²

We heard similar comments from volunteer firm counsel in the initial sample, including this comment from the ethics advisor at a 250-lawyer firm:

I have had discussions with partners . . . who have told me that my duty is to them and not to the firm I am sure the vast majority would say that my duty is clearly to the partnership [as a whole] I usually can sort out that problem, but . . . I struggle with that issue. [B5].

In fact, several volunteers in the initial sample did not view themselves as being in a lawyer-client relationship with the firm. For instance, two volunteers said they encourage lawyers to speak to them "in confidence" if questions or problems arise. As one conflicts partner, who also is the chair of his firm's professional responsibility committee, explained:

They don't come to the entity, they come to someone on the committee. They are assured that they can do it in confidence, and that they not only have a right to do it, they have the duty to do it. [B3].

Another example comes from the chair of the ethics committee at a 150-lawyer firm:

I can think of two specific instances where [associates have come to me in confidence]. One was an associate who . . . was concerned about whether or not she had, in effect, been requested to inflate billings I told her that I would not disclose her identity [C1].

As a strategy for encouraging internal reporting, the promise of confidentiality is appealing. Most respondents agreed that getting lawyers to come forward with questions and problems is one of the most challenging aspects of their job,¹¹³ and on the most sensitive issues, assuring confidentiality may be the only way to get lawyers in

112. Chambliss & Wilkins, *supra* note 3, at 590–91.

113. *Id.* at 587 (quoting several focus group participants on this point).

the door.¹¹⁴ Yet promising confidentiality to individual lawyers, or allowing lawyers to be confused on this point, would be incompatible with the role of firm counsel. Firm counsel have an obligation under Rule 1.13(b) to report certain types of misconduct to law firm management.¹¹⁵ Firm counsel also have a duty to report certain types of misconduct to disciplinary authorities¹¹⁶ and clients.¹¹⁷ If the interests of the reporting lawyer are adverse to the firm, Rule 1.13(f) requires firm counsel to clarify that the firm is the client.¹¹⁸

Some firms have attempted to resolve this problem by creating a separate in-house position for the specific purpose of receiving confidential reports. This position, typically titled “ombudsman,” is designed primarily for associates, who may be nervous about exposing their ignorance or questioning their superiors’ conduct. Leaving aside the obvious question about whether this type of resource is effective—it may be that even ombudsmen do not seem trustworthy in some contexts—there also is a question as to whether ombudsmen actually solve the problem of confidential reporting. Although ombudsmen, by definition, do not represent the law firm, they still have an obligation as lawyers to report some types of lawyer misconduct under Rule 8.3.¹¹⁹ Thus, unless the ombudsman can be said to represent the reporting lawyer, and thus owe that lawyer a

114. For example, studies show that confidentiality is important in encouraging employees to report sexual harassment. In a 1995 survey of federal employees, 19% of harassed employees who did not report the harassment indicated that the lack of confidentiality played a role in their decision not to report. See U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS AND CONTINUING CHALLENGES* 35 (1995), available at http://www.mspb.gov/studies/sex_har.pdf. In another survey of women in management, over 80% of those surveyed indicated that an assurance of confidentiality would encourage employees to report sexual harassment. See Shirley Feldman-Summers, *Analyzing Anti-Harassment Policies and Complaint Procedures: Do They Encourage Victims To Come Forward?*, 16 LAB. LAW. 307, 309–16 (2000).

115. See MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (2003) (requiring lawyers to report misconduct that is “likely to result in substantial injury to the organization . . . to a higher authority in the organization”).

116. See *id.* R. 8.3(a) (stating that “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority”).

117. See *id.* R. 1.4(a)(1) (stating that “a lawyer must promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required by these Rules); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 20 cmt. c (2000) (stating that “[i]f the lawyer’s conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client”).

118. See MODEL RULES OF PROF’L CONDUCT R. 1.13(f) (2003).

119. See *id.* R. 8.3(a).

duty of confidentiality,¹²⁰ the creation of an ombudsman merely reproduces the original tension in a new guise.

Several volunteers in the initial sample also said that they routinely represent individual firm members accused of misconduct. One volunteer described his practice in representing firm members as follows:

I get involved in [claims] for purposes of determining the extent to which we need to have that lawyer represented at the deposition, with pretty much a policy that I will attend that deposition with the lawyer. On the occasion that we think something is brewing, I may hire outside counsel. That doesn't happen too often If there is a [disciplinary] complaint, the bar asks for a response, I am, invariably, involved in that activity. [C2].

Another example comes from the ethics committee chair quoted above:

We have had occasion where there's been disciplinary charges filed against someone. Those come to me

Q. When you say it comes to you, do you actually represent the person in the proceeding?

A. Yes.

Q. How about malpractice claims?

A. . . . [They] come to me. [C1].

Such comments prompted lively debates in two of the three focus groups, with some respondents defending the practice of representing firm members and others expressing strong reservations about it. As one part-time general counsel from a 1,200-lawyer firm put it, "I would not dream of representing one of my partners in a disciplinary proceeding." [A10].

What was interesting about these debates, however, was not respondents' differences of opinion about whether, if ever, to self-represent. This is a complex and interesting issue, deserving of a separate paper.¹²¹ What was interesting was that some volunteers

120. See *id.* R. 8.3(c) (stating "[t]his Rule does not require disclosure of information otherwise protected by Rule 1.6 [defining the lawyer's duty of confidentiality]").

121. Respondents in the 2005 sample also were split on this issue, with some routinely getting involved and others feeling strongly that such involvement is inherently problematic. As one respondent put it, "the self-representation issue is all over the

obviously had not given much thought to the potential for a conflict of interest between the individual and the firm. One volunteer said, in explaining his practice of assisting in firm members' defense, "[w]e are not holding ourselves out as lawyers to individual lawyers in the firm, or maybe even to the firm. We are the people with responsibility within our firms to resolve problems We're trying to deal with problems as a business organization. [We] are not necessarily functioning as lawyers." [C2].

Respondents who are formally appointed and paid to act as firm counsel not surprisingly tend to be much clearer about their role as firm counsel and their duties to the firm as a client. Most "professional" firm counsel in the sample were quick to compare the role of firm counsel to that of corporate counsel and displayed ready familiarity with the requirements of Rule 1.13. As to confidential reporting, for instance, one full-time firm counsel said:

I have not run into a situation where I felt that [confidentiality] was a problem. I can imagine it being a problem if somebody has—if there has been malfeasance of some kind and they want to tell you about that. . . . You would be in the same situation as an in-house counsel where you have to say at some point, "maybe you need to get your own lawyer and avoid this conversation." [A1].

Consider also the following comment from a paid, part-time firm counsel:

board." [I5]. One factor that affects respondents' practices is their liability coverage. Some insurers allow firms to self-represent with the carrier's permission, whereas others do not. Some policies allow time spent on self-defense to be billed against the firm's deductible, which is also a consideration for firms. Several respondents referred to the terms of their coverage in explaining their position on this issue. As one respondent said: "We routinely respond to disciplinary inquiries. We often defend ourselves on malpractice claims, within our self-insured retention and with the consent of our carrier. In such cases, the individual lawyers may or may not have their own counsel." [I6]. Another important factor is the practice background of firm counsel. Said one respondent: "I can think of a very large national firm where the risk manager is a very good trial lawyer and where the insurer lets the firm self-represent and he does it. If the general counsel had been a securities lawyer, they wouldn't touch it." [I5]. Finally, some respondents argue that there is rarely a conflict between the interests of the individual and the firm. According to one respondent, who represents his firm in "80 percent of our claims":

Even if [a claim] has merit, there's no conflict. Certainly the joint representation issue is present but for the most part, the individual's interest and the firm's interest are identical in defeating the claim. I have yet to see any fallout in the firm from someone being sued for malpractice. Being fired or losing compensation. [I3].

As counsel to the firm, I have a conflict of interest with my clients sometimes. . . . The partners and associates in the law firm, just as the officers and employees of a corporation, often have conflicts of interest with the entity and I must be very careful of that. [A10].

Respondents also appear to have become more sensitive to their duties over time, with a marked difference between respondents in the initial and subsequent samples. In the 2005 sample, even volunteers identify the firm as the client and are clear about what that entails. The following comment comes from a volunteer in a 700-lawyer firm:

When receiving confidential reports, firm counsel must explain that he or she is the firm's lawyer. Confidentiality will be maintained to the extent possible, but any disclosure necessary will be made to firm management. [I6].

Or, as one paid, part-time firm counsel explained:

In most imaginable situations firm counsel will have a duty to report to the managing partner, or the managing partner and/or the management committee. If the reported misconduct raises the prospect of a potential claim against the firm, firm counsel may be required to notify the firm's . . . carrier. If the report casts reasonable doubt on the honesty, trustworthiness or fitness of the member, firm counsel may need to report under Rule 8.3 If the misconduct involves legal malpractice, the firm owes a duty to report its own malpractice to the client. [I3].

One might suspect that the difference between samples results from imprecise sampling and that some volunteers in the initial sample should not be included in an analysis of "firm counsel." Obviously, it is a bit tautological to state that lawyers who view themselves as firm counsel are more likely to be aware of their duties as firm counsel. There are, however, at least two reasons to believe that the difference reflects changes in the population of interest; that is, in the professional identities and sensitivities of the lawyers themselves.

First, during the three years between samples, there were three published cases addressing the scope of the attorney-client privilege for communication between firm counsel and other members of the

firm.¹²² These cases were discussed in law reviews¹²³ and the legal press¹²⁴ and prompted a formal ethics opinion by the New York State Bar Association.¹²⁵ The respondents in the 2005 sample were keenly aware of these opinions and the issue of privilege more generally. Several respondents mentioned that privilege considerations affect their work habits, and one respondent expressly reported that things had changed over the past several years. The following comment comes from the assistant general counsel in a large East Coast firm:

I don't remember [the previous general counsel] thinking about it. When I did time sheets I put down everyone I talked to and what I talked about. But [the new general counsel] doesn't want those things to be discoverable. So now I just say "ethics and conflicts issues." Which makes filling out my time sheets much easier. Also, sometimes I'll be talking to someone about a lawyer in another office doing something they shouldn't be and there will be all this email back and forth and at some point I say, "would someone please pick up the phone and call me and stop all this email traffic?" [I11].

In addition to raising awareness about the potential discoverability of in-firm communication, the privilege cases also raised firms' awareness of the need to formally define the firm counsel position. Some consultants attribute firms' efforts to establish the structural independence of the position to concerns

122. See *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 287–88 (S.D.N.Y. 2002) (holding that "a law firm cannot invoke the attorney-client privilege against a current client when performing a conflict check in furtherance of representing that client"); *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002) (holding that as long as the firm continued to represent the client, the firm could not maintain any privilege against the client); *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866, 878 (Wash. Ct. App. 2005) (stating that applicability of the attorney-client privilege to in-firm communications "must be determined on a case-by-case basis").

123. See generally William T. Barker, *Law Firm In-House Attorney-Client Privilege Vis-à-Vis Current Clients*, 70 DEF. COUNS. J. 467 (2003) (criticizing the denial of privilege in *Bank Brussels* and *Koen Book*); Chambliss, *In-Firm Privilege*, *supra* note 34 (suggesting a framework for analyzing the scope of in-firm privilege); Douglas R. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 SYRACUSE L. REV. 69 (2004) (discussing the implications of the cases for law firm internal investigations).

124. See, e.g., Anthony E. Davis, *Professional Responsibility: Multijurisdictional Practice, Internal Discussions, Counsel's Advice*, N.Y. L.J., July 7, 2003, at 3 (criticizing *Koen Book*).

125. NYSBA Comm. on Prof'l Ethics, Formal Op. 789 (2005) (stating that, "[i]n considering its obligations to its clients, a law firm may consult with one or more lawyers in the Firm" in confidence without creating an impermissible conflict of interest with the client).

about preserving the privilege for communication with firm counsel.¹²⁶ Thus, concerns about the privilege undoubtedly have contributed to the "professionalization" of firm counsel, including an increased sensitivity to the formal responsibilities of that role.

The second reason to believe that firm counsel have become more sensitive to their professional duties is that they are interacting more with each other as a specialized professional group¹²⁷ and such interactions tend to promote the development of shared professional norms.¹²⁸ The debates among focus group participants about the issue of self-representation are one example of this.¹²⁹ Participants who had not previously considered the potential for conflicts of interest presumably left the focus group with more awareness about the issue. On other issues, focus group participants were explicit about the benefits of exchange¹³⁰—indeed, this was part of our motivation for organizing focus groups in the first place.¹³¹

Thus, the professionalization of firm counsel is both the cause and consequence of heightened sensitivity to the rules governing in-house counsel and the identity of the firm as a client. As firms' reliance on firm counsel has grown and firm counsel have become more specialized, the role of firm counsel has become more defined and distinct from that of other lawyers in the firm. Part II.B examines the consequences of this increasing distinction for firm counsels' professional orientation and their day-to-day role within firms.

B. *The Sociological Inquiry*

Most respondents focus primarily on managing conflicts of interest and related issues such as client intake and lateral hiring. Indeed, in many firms, the position of firm counsel emerged initially as a response to the risks and inefficiencies associated with the

126. See Thornton, *supra* note 36 (quoting Ward Bower about firms' concerns about privilege).

127. See *supra* notes 27–28 and accompanying text (describing the advent of roundtables and conferences for firm counsel).

128. See Edelman & Suchman, *supra* note 84, at 498–501 (reviewing research on the role of professional networks in spreading ideas and information among organizations).

129. See *supra* note 121 and accompanying text.

130. See Chambliss & Wilkins, *supra* note 3, at 577 (reporting an exchange among participants in the first focus group about the scope of compliance efforts within firms). As one participant said, "[A14] said about ten things that I know I ought to be doing and I don't." [A3]. *Id.*

131. See *id.* at 589–91 (noting the potential importance of specialist networks among firm in-house counsel); Chambliss & Wilkins, *supra* note 50, at 711–12 (same).

decentralized management of conflicts of interest.¹³² As one respondent observed:

[My position] evolved as malpractice problems in large and smaller firms became much more acute and conflicts in particular became an extremely important part of those proceedings. We saw that we institutionally needed to have a tight ship. We do all the conflicts clearance out of [the main office location]. . . . [A7].¹³³

Another respondent's full-time position was created in anticipation of a merger:

When we went through the combination . . . [w]e sat down and said well, we have [hundreds of] lawyers in [other jurisdictions] . . . all doing conflicts differently At that point, a whole lot of people got different jobs because this is going to be centralized, there weren't going to be cowboys, there couldn't be cowboys No more clearing your own conflicts. It was a huge jerk for most people. . . . We knew that conflicts was going to be the largest issue . . . and if we didn't get it right it was going to be a big, big problem. [A8].¹³⁴

While the preceding examples come from respondents in the initial sample, nearly all the respondents in both samples report that conflicts dominate their agenda. Said one volunteer, "I've never broken it out, but certainly new business questions are the single biggest area of concern. . . ." [I8]. One respondent reports that "seventy to eighty percent of my time is spent on conflicts." [I11]. Another respondent from the 2005 sample gave the following summary:

The overwhelming number of questions are about conflicts What counts as direct adversity under 1.7? What counts as substantially related under 1.9 Questions about whether a screen can be erected and whether it will be effective. Whether certain conflicts are consentable. What I call "hot potato" issues: can we solve this by dropping client A to get client B? Thrust upon conflicts It's a hard area. [I5].

Given respondents' near unanimity about the centrality of conflicts, the interesting question—at least as we framed it in the

132. Chambliss & Wilkins, *supra* note 3, at 566–69 (providing examples).

133. *Id.* at 569 (second alteration in original).

134. *Id.* (alterations in original).

initial analysis—is to what extent respondents focus on issues other than conflicts.¹³⁵ In the initial analysis, we focused primarily on other ethical issues; that is, “issues under the rules of professional responsibility.” [B9].¹³⁶ We were not very specific, however. We classified respondents’ “substantive jurisdictions” on a crude spectrum from “conflicts” to “broader”¹³⁷ and classified their orientation to their in-house role as “reactive” or “proactive.”¹³⁸ We found that the primary variable affecting respondents’ positions on these spectrums was the structure of compensation.¹³⁹ Partners who were not compensated directly for their in-house service tended to “focus primarily on answering [conflicts] questions and . . . to be protective of their time,”¹⁴⁰ whereas partners who were compensated directly tended to “play a much broader and more proactive role in their firms.”¹⁴¹ Based on this finding, we concluded that “firms get what they pay for,”¹⁴² and urged firms to invest directly in the firm counsel position.¹⁴³

This Section follows up on that analysis from a slightly different angle, by asking what groups are served by firm counsel and with whom firm counsel identify. Specifically, to what extent do respondents serve as a resource for associates and staff, in addition to partners? To what extent do respondents identify professionally with partners? And to what extent do the answers to these questions depend on the structure of compensation and whether firm counsel come from inside or outside the firm?

For the most part, my findings are consistent with those of our initial analysis. In general, compensated firm counsel tend to play a broader and more proactive role than uncompensated firm counsel, and to address a wider range of issues and constituencies within the firm. As in the initial sample, respondents in full-time positions are especially likely to perform other functions in addition to managing conflicts, and to serve as a resource for other constituencies, in addition to partners. In some of the larger firms, full-time firm

135. *Id.* at 573.

136. *Id.* at 573–74 (quoting a focus group participant about his substantive jurisdiction in the firm).

137. *Id.* at 567.

138. *Id.* at 574 (quoting one volunteer who described his in-house service as a “terrible burden” and characterized the 500 hours per year he typically spends on the function as “almost all reactive time”).

139. *Id.* at 573 (identifying compensation as the key variable).

140. *Id.*

141. *Id.* at 574.

142. *Id.* at 577.

143. *Id.* at 580.

counsel may even have a staff to assist them in routine conflicts matters, thus freeing up some of firm counsel's time for other tasks.

For instance, one full-time general counsel at a 950-lawyer firm has a "chief of staff . . . [who does] the traffic cop work on client intake. He happens to be a lawyer but he isn't functioning as a lawyer; he functions as an administrator in the firm." The respondent estimates that he himself spends about 40% of his time on conflicts and intake, including strategic questions about the areas of practice that "we want to get into." The rest of his time is spent on claims and answering lawyers' questions, "[q]uestions that at the beginning of the day I have no reason to anticipate A lot of them lately have been on audit letter responses." [I10].

Another respondent is a full-time assistant to the part-time general counsel of the firm:

Q. How do you divide up the job?

A. He does the insurance coverage . . . and handles hiring outside counsel for malpractice issues, and answers questions, whatever. I field people's questions, too, and do engagement letters, conflicts.

Q. How do the questions break down? Is it a matter of what office the people are in, or your availability . . . ?

A. It's availability. He practices, so he is not always [available]. A lot of times people send us both a question—it's kind of a work in progress, actually. I don't know if this is the most efficient way to do it. Most of the time, people have emergencies and are freaking out and want an answer right away. [I11].

These examples suggest that increasing investment in the firm counsel position (or positions) will bring increased attention to the compliance function, for instance by making firm counsel more available to answer questions on a day-to-day basis. Respondents in both samples stressed the importance of being readily available.¹⁴⁴ The general counsel quoted above said that he makes himself "psychotically available" as a matter of policy. As he explained it:

You've got to get a sense of what people are up to, and insinuate yourself as much as possible in the daily transactions of the firm. I make sure to be as responsive to emails and

144. *See id.* at 586 (quoting several respondents from the initial sample on this point).

phone calls as I would be to any demanding client. It is a twenty-four hour job. I wake up dealing with Asia at night and go to bed dealing with Asia in the morning. [I10].

Yet while the availability of firm counsel to answer questions is an obvious good, my findings also reveal some potential trade-offs of the professional, full-time model—especially when the full-time firm counsel is appointed from outside the firm. First, it appears that staff, rather than associates, are the primary beneficiaries of firms' increasing investment in the firm counsel position. Although several full-time respondents mentioned dealing with associates "in orientation" [I12] or "when they come in in the fall" [A8], most full-time respondents have very little day-to-day interaction with associates. As one full-time general counsel reports, "I have some interaction with associates but it is a bit of a vacuum. I work a lot with partners, senior partners, and they are more likely to call. It's not discouraged, but the first rule for associates usually is to ask the partner." [I12]. A few respondents were even a bit dismissive of associates' concerns. As one respondent said:

Associates can be naïve. You get a breathless phone call, "the partner is asking me to back date documents!" And it turns out this is a closed corporation, five guys who have been working together for months, it's a start up, and now they need a current board ratification of prior decisions, perfectly legal. No one is defrauding anyone. [I1].

On the other hand, several full-time respondents report that they have significant dealings with non-lawyer managers and administrative staff. Firm counsel appointed from outside, in particular, appear to work closely with non-lawyer managers and administrators within the firm. One full-time firm counsel, who is not a partner, and was appointed from outside the firm, reports directly to the Chief Operations Officer ("COO") "on my administrative duties," and to the management committee on "the legal side." The COO is not a partner but "was hired from industry." [I1]. Another full-time firm counsel, who is not a partner, and was brought in from outside the firm, describes his day-to-day work as follows:

It's a combination of office advisory—that's a euphemism for whatever crap comes across your desk—certain long-term projects, certain short-term projects. One thing that is significant, being full-time, is the amount of time I work with senior administrators rather than with lawyers. I feel like—I

was at a meeting and looked around the table and thought, “here is my team, these are my guys.” The people in the financial department, the benefits department, the personnel department. To a good extent, they are my clients, too, and they were the most neglected areas before I came. Vendor contracts—I review them. They were not reviewed before. Same with the HR [human resource] people, now they have someone to consult, hopefully prospectively, on compliance, individual contracts. Same thing with marketing, making sure we review marketing materials, review our website. [I12].

In reporting these comments, I do not mean to suggest that administrative issues are unimportant or less deserving of firm counsels’ time than questions from lawyers. As others have noted, law firms traditionally have been relatively poorly managed,¹⁴⁵ and there are undoubtedly many aspects of firms’ business that need attention. It is noteworthy, however, that these particular respondents have significant administrative duties, because as full-time, non-partner counsel, who were appointed from outside the firm, they represent the new breed of “professional” firm counsel. As noted above, the first wave of firm counsel—those part-time, volunteer ethics advisers who did not always follow Rule 1.13—referred to the lawyers in the firm as “my guys.” By comparison, one respondent quoted above refers to the senior administrators as “my guys.” What does this imply for the future role of in-house counsel in law firms?

Further evidence of a possible shift in the jurisdiction of professional firm counsel is that several full-time respondents in the 2005 sample report that they are not primarily responsible for answering questions about ethics. For instance, the full-time firm counsel with the chief of staff describes his jurisdiction as follows: “I am the person who gets all the claims. I am not THE person who gets all the ethics questions Those go to the head of our ethics committee.” [I10]. The respondent who views the senior administrators in the firm as his guys likewise reports that he is not “exclusively” responsible for “conflicts and ethics”:

Q. Was there a general counsel in the firm before you [were brought in from outside]?

145. See NELSON, *supra* note 41, at 77–80, 205–28 (discussing lawyers’ ideological resistance to centralized management); Susan S. Samuelson, *Strategic Planning*, in *LAW FIRM MANAGEMENT: A BUSINESS APPROACH* ch. 1, § 1.7, at 57 (Susan S. Samuelson ed., 1994) (same).

A. No, but the big issues were all being handled somehow. So, how were they going to feel about someone coming in and taking their stuff away? Some were delighted. Some said they were, but they aren't. They like being indispensable, it gives them an *entre* to senior partners in the firm and they don't want to let it go. I try to be diplomatic and work with them. They do have institutional knowledge. . . . [I]t's like any other client. I try to work with them. In some areas, I didn't take things over. Conflicts and ethics—the firm already had a well-functioning conflicts and ethics group, lawyers who knew those issues better than I. [I12].

One must be careful, obviously, about generalizing from these few examples. Even in my small sample, the role of firm counsel varies significantly from firm to firm, both within and across the structural categories that I have defined. Thus, I do not mean to argue that professional firm counsel ignore associates and do not care about ethics—or even that the few respondents quoted above do either of those things. On the contrary, as I report in Part IV, most respondents in the sample appear to be dedicated and conscientious lawyers who are professionally committed to promoting accountability and compliance within firms.

Nevertheless, my findings suggesting a shift in the substantive jurisdiction of firm counsel are consistent with the findings of the 2005 survey of general counsel in Am Law 200 firms. That survey found that the percentage of respondents who advise their firms on employment law and real estate matters had increased since 2004,¹⁴⁶ while the percentage who advise their firms on professional responsibility and ethics had declined.¹⁴⁷ A shift in jurisdiction also would be consistent with the increasing formal distinction between firm counsel and partners.

One question is whether the shift I observe is a necessary or permanent feature of the “professional” model. Although most large law firms rely to some extent on professional and non-lawyer managers,¹⁴⁸ firms have resisted appointing professional managers for

146. See FLASH SURVEY, *supra* note 5, at 8 (reporting that 65% of general counsel advise their firms on employment law, up from 53% in 2004, and that 24% advise their firms on “leases and . . . real estate issues,” up from 18% in 2004).

147. *Id.* at 9–10 (reporting that 82% of respondents advise their firms on professional responsibility issues, down from 88% in 2004, and 63% conduct in-house ethics education, down from 68%).

148. See Susan M. Carrochi, *Tired of Reinventing the Wheel? Consider Joining Local ALA Chapter*, LEGAL INTELLIGENCER, Jan. 27, 1997, at 3, available at LexisNexis

key posts, such as managing partner.¹⁴⁹ The conventional wisdom is that “lawyers want to be managed by a lawyer”¹⁵⁰—meaning lawyers actively engaged in private practice (or not long removed). Having an outside practice may be especially important for firm counsel, insofar as they advise the firm on sensitive issues such as conflicts and intake. As one respondent put it, “[i]n a way, it is easier to run a law firm. We can function quite well if eighty to ninety percent of people don’t trust [the managing partner]. But I wonder what we would do if the general counsel weren’t accepted.” [I10].

At the same time, it is mistake to assume that professional firm counsel face the same resistance to their authority as non-lawyer managers. After all, full-time firm counsel are lawyers, and most are not long removed from private practice. Moreover, as I argue in the next Part, building a practice inside a law firm may not be so different from building a practice based on outside clients. Thus, rather than viewing firm counsels’ authority as being structurally determined—first by their “in-house” position, and then by whether they hold that position full-time—I argue that the role of firm counsel should be viewed as a market niche, with a tendency to expand over time.

III. THE NATURE OF FIRM COUNSELS’ AUTHORITY

Most part-time firm counsel in the sample were skeptical that full-time firm counsel would be respected by partners. As one respondent put it, “They’re not down in the trenches and that’s what some lawyers are always talking about: ‘I’m in the trenches and you’re not.’ So I think there is some benefit to . . . having an active practice.” [C2].¹⁵¹ Part-time firm counsel report that having an outside practice is especially important for their authority in decisions

Academic (discussing the formation and early history of the Association of Legal Administrators, an international organization with 8,000 members in 1997); Richard R. Hellstern, *What is the Future Role of Non-Lawyer Executives; Letting Lawyers Concentrate on Law, Leaving Administration to a Pro*, LEGAL INTELLIGENCER, Apr. 15, 1996, at 54, available at Lexis Nexis Academic (discussing the “churning” of legal administrators as firms experiment with different forms of management); Tom Schoenberg, *Getting Down to Business*, LEGAL TIMES, Oct. 19, 1998, at S56 (discussing Howrey & Simon’s use of non-lawyer managers).

149. See Schoenberg, *supra* note 148, at S56 (stating that “it is unlikely that a non-lawyer will become a managing partner of a firm anytime soon”). In fact, the Model Rules currently forbid non-lawyer ownership and executive management of law firms. See MODEL RULES OF PROF’L CONDUCT R. 5.4 (2003) (“Professional Independence of a Lawyer”).

150. Schoenberg, *supra* note 148, at S56 (quoting Michael Nannes, deputy managing partner of D.C.’s Dickstein Shapiro Morin & Oshinsky).

151. See Chambliss & Wilkins, *supra* note 3, at 581.

about business intake. The following comment comes from part-time firm counsel at a 550-lawyer firm:

I think that the reason that the counseling is done by individuals who really are functioning, practicing lawyers—I'm a litigation partner, I have a litigation practice—is that we feel that people who are actively engaged in practice can bring experience to bear that's important to take into consideration in resolving many of these issues. I also think that decisions, or the advice we give—I have no idea how much I cost the firm in the course of a year by telling them we can't take on matters—I think the judgment is accepted more readily because it is coming from somebody who is an active partner in the firm. [B2].¹⁵²

Respondents also stressed the importance of tenure in the firm and personal ties with firm leaders. The following comment comes from a part-time firm counsel at a 175-lawyer firm:

I have never had a situation in a conflict situation where someone has done an end run around me, or been able to undo what I have done. I have a very strong relationship with the managing partner and the people on the management committee. They have all been here more than fifteen years and I have been here more than twenty years. I think that is very helpful in the general counsel role. [I3].

Such comments suggest that “professional” firm counsel—that is, full-time firm counsel and those appointed from outside the firm—ultimately may not be effective in the firm counsel role. Some commentators expressed similar views in the legal press following Shutkin's appointment as general counsel at Shearman & Sterling. One consultant noted that long-term partners “know the firm's history, culture, clients and what its objectives are.”¹⁵³ Another said that firm counsel from outside “often do not sit at board or partnership level . . . [and] do not have the power to make things happen.”¹⁵⁴

152. *Id.*

153. See Thorton, *supra* note 36 (quoting Ward Bower).

154. See Mullally, *supra* note 2 (quoting Andrew Nickels, risk manager at Zurich Professional); see also Douglas R. Richmond, *Essential Principles for Law Firm General Counsel*, 53 KAN. L. REV. 805, 812 (2005) (arguing that law firm general counsel should be equity partners to give them credibility in the firm and signal management's support for the position).

This Part questions this structural theory of firm counsels' authority. I find that respondents in full-time positions and those appointed from outside the firm are as likely as respondents in part-time positions to report that they have sufficient authority to be effective in their roles. The sources of their authority tend to be somewhat different than those of part-time and insider firm counsel: whereas part-time firm counsel tend to rely on their ownership interest and personal ties to firm leaders, full-time firm counsel are more likely to draw on external professional networks and the demands of insurers. Nevertheless, the respondents' comments indicate that there are a variety of potential sources of professional authority for firm counsel.

These findings suggest a need to rethink the nature of firm counsel's authority, and perhaps the nature of managerial authority in modern law firms more generally.¹⁵⁵ In the case of firm counsel, my findings point to a market model of authority, whereby firm counsel build their in-house practice over time and through a variety of methods—much like successful partners do in an outside practice. Respondents' comments suggest that the key ingredients of success in this effort are personality and the support of firm management—resources that potentially are available to full-time and part-time firm counsel alike.

This is not to say there are no meaningful differences between firm counsel with authority over conflicts, which by all accounts is a core ethical and strategic issue within law firms, and those whose jurisdiction extends primarily to more peripheral matters, such as vendor contracts and the terms of the office lease. I find, however, that most firm counsels' jurisdictions have expanded significantly over time. Thus, it may be too early to judge the authority of firm counsel from outside of the firm.

155. The sociological literature traditionally has emphasized the tension between bureaucratic authority based on holding a particular title or office, and professional authority based on expertise (or control over clients). See Talcott Parsons, *Introduction to Max Weber*, in MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATIONS* 59, 60 (A.M. Henderson & Talcott Parsons eds. & trans., 1947) (criticizing Weber for failing to draw this distinction); W. Richard Scott, *Professionals in Bureaucracies—Areas of Conflict*, in PROFESSIONALIZATION 265, 270–71 (Howard M. Vollmer & Donald L. Mills eds., 1966) (arguing that bureaucratic authority threatens professional norms); see also NELSON, *supra* note 41, at 10, 205–08 (discussing the tension between bureaucratic and professional authority in law firms). As others have cautioned, however, it is important not to overstate the distinction between bureaucratic and collegial organizations. *Id.* at 201. In particular, this distinction ignores the growing category of “managerial professionals” who “perform the complex and highly political task of managing practicing professionals.” Rabban, *supra* note 87, at 1841.

A. *In-Firm Practice as a Market*

To some extent, all this talk of professional “authority” is misleading, since most firm counsel have little hierarchical or coercive power. As one law firm management consultant points out, in a corporation, managers cooperate with the general counsel because they have to, while in a law firm, partners cooperate with firm counsel because they want to.¹⁵⁶ Thus, in most firms, firm counsel must drum up their own business. Consider the following comments by two full-time firm counsel:

[After the focus group] I'll be getting on the train, to go to [a different city], and tomorrow at lunch I will talk to all the new attorneys who joined our [] office since last year, so they have a face they can attach with a phone number . . . and say, “here's what I do, here's what resources I have that are available to you, here's some rule provisions that might come up sooner rather than later, here's some firm policies to be aware of.” That's Thursday lunch. Friday lunch is talking to all the attorneys in the [] office on recent cases and ethics opinions in [that jurisdiction]. I think getting out there, and being there, brings people to me. [B4].¹⁵⁷

I look at every lawyer in the firm as my client. I think how to market myself. I look at ethics and risk management programs as advertising. And usually advertising is not all that effective. Necessary but not sufficient. What is the most effective way? Developing people's trust. Is it effective to pick up the phone and say, “Do you have any problems?” Generally not. But if you go to someone's office and say, “let's talk,” you find things out. [O4].

Most respondents say that to be effective, firm counsel must walk softly and show the utmost deference to partners who come—voluntarily—for advice. Deference to partners' autonomy is especially important in decisions about business intake—as even respondents with sizable equity stakes in their firms acknowledge. As one part-time firm counsel said:

156. See Flahardy et al., *supra* note 4, at 150 (attributing this line to James Jones, director of the Hildebrandt Institute); see also Jarvis & Fucile, *supra* note 19, at 106 (stating that, as firm counsel, “we have opposed efforts to make [in-house] consultation mandatory” because “we believe that our advice will be best received if it is voluntarily sought”).

157. Chambliss & Wilkins, *supra* note 3, at 588.

If you say no all the time, people will go underground. And if they think that you give them correct advice—that you are on their side, you would like to do what you can to facilitate the acceptance of the matter but you know where the lines need to be drawn—they’ll come to you. [A5].¹⁵⁸

One full-time firm counsel who focuses primarily on conflicts and business intake explains his strategy as follows:

To be most effective, you have to go through a process of convincing your colleagues that “I’m not saying no, I’m just telling you all these things because eventually you are going to say no, and we are going to get where we want” Standing up in front of a group and saying “thou shalt not”—it tends not to work very effectively when you have 600 owners of a firm and each one believes he or she is autonomous. [A7].¹⁵⁹

Or, in the words of I10, the full-time firm counsel with the chief of staff, quoted above, “[y]ou don’t want to be Doctor No. Instead, I’m Doctor Yes, But” [I10].

A number of respondents emphasized the personality component of the job. Firm counsel have to be “approachable” [I4] and “nonjudgmental.” [C2].¹⁶⁰ As I10 put it, “there’s no room for a scold in the general counsel’s office. If you need to tell a partner not to do something, that’s when I go out and hire a law professor at some ethics center.” [I10]. One respondent summed up it up follows:

How do you get people to come forward with issues so they may be resolved in the most appropriate way? . . . That’s the personality component of this particular job. If you have the right person operating in the right environment, you draw people to you and it becomes part of the culture. [A12].¹⁶¹

Thus, respondents’ authority is developed primarily through internal marketing based on factors such as deference to the client, personality, and fit. And while insiders may develop this authority before they take on the role of firm counsel, outsiders also may develop it over time. Although respondents agree that it takes a “special person,” I10 said, “I have talked to several people who have been embraced faster than they expected to be.” [I10]. One

158. *Id.*

159. *Id.*

160. *Id.* at 587.

161. *Id.*

respondent who became part-time firm counsel shortly after joining his firm describes his experience as follows:

I was kind of dropped in from outside. I was the director of the state lawyers' board. And it did take some time both to get to know people and for me to get to know, particularly—I was a trial lawyer . . . [and] I remember somebody talking about, "I have a securitization question," and [thinking], "that sounds like a security. What is it?" That type of thing. It took a while to get up to speed. But I think that's manageable over a period of time. [A14].

B. The Expanding Role of Firm Counsel

It probably helps that there is great demand for firm counsels' services. By all accounts, the job expands from the minute one takes it on. Numerous respondents in both samples grumbled about the demands of the job, especially part-timers who were trying to hang on to some kind of outside practice. The following comment is from a part-time firm counsel at a 175-lawyer firm:

I see tension building up. When I first started doing this job it didn't take that much of my time but I have kind of expanded the role as I have learned more and become more experienced and my practice has started to shrink. It's what happens to managing partners, the exact same thing. They see their practice shrinking, they work themselves out of the market. If you are a managing partner for five or six years and you step down from that, you don't have any clients. [I3].

Part of the pressure stems from constant day-to-day questions from lawyers. As one respondent said, "[e]very day, it's a constant flow of questions They don't usually take more than ten or fifteen minutes each, but sometimes there's research that has to be done." [C3].¹⁶² Another said, "I answer the phone all the time. There's constant interruption. . . ." [C2].¹⁶³ Thus, several part-time respondents said that they contemplated moving into a full-time in-house role at some point. I10 reported, "I know several [firm counsel] who claim to be doing it half time and every time I talk to them that number goes up." [I10].

162. *Id.* at 586.

163. *Id.*

Even full-time firm counsel worry about keeping up with the job. Several respondents who have moved from part-time to full-time positions said that, once a resource was made available, the work expanded to fill their time.¹⁶⁴ One respondent said, “[m]y hours are worse than full-time outside practice. I go from first thing in the morning to late at night because of the people on the West Coast. I get phone calls all day Saturday at home. I work 250–300 hours per month.” [I11]. Several respondents talked about taking on staff. As I10 observed, “[a]t any firm of 500 or so lawyers, there’s enough for one full-time person to do. There is certainly enough at 1,000 [I]f there is someone who is a point person, people jump all over it.” [I10].¹⁶⁵

Thus, firms’ resistance to full-timers and outsiders may be a bit of a myth. According to one respondent:

I do think in some ways there is a kind of “us versus them” that, you know, nobody is going to understand our culture like us. Which is not necessarily true. For example, we hired a pro bono lawyer from outside and the first idea was, they are not going to fit. She is not going to stay We ended up with a couple of people basically mentoring her the first year, as in, “this is a delicate issue, this is what you don’t understand, here are the politics here,” and after a year she understood it. And it’s like she has been there all along. [A13].

C. Sources of Authority

Respondents agree that the most important source of firm counsel’s authority is the support of firm management.¹⁶⁶ In the words of one respondent, “none of this stuff works unless you have the power of the firm behind you. Whether or not you have individual power or how you get things done, whether it’s because you are a big rainmaker or have a pleasing personality, you need [top management support].” [A13].¹⁶⁷

164. *Id.* at 576–77 (quoting several respondents on this point); *see also supra* note 82 and accompanying text (noting that the work tends to expand to fill the available time).

165. *See* McElligott, *supra* note 25, at 21 (quoting Holland & Knight general counsel Kinder Cannon). Cannon, a full-time general counsel since 2000, says he is often “overwhelmed” by his workload. According to Cannon, “[i]t is clearly a full-time job. I don’t know how else I would do it.” *Id.*

166. *See* Chambliss & Wilkins, *supra* note 3, at 582–83 (quoting several respondents from the initial sample about the importance of visible support from top management).

167. *Id.* at 582 (alteration in original).

One respondent referred to this factor as "management buy-in." As he noted, "they always say how important this function is [But] when the ethics part of the retreat is at eight a.m. on Sunday, that's a bad sign." [O3]. Said another respondent, who had been appointed from outside the firm, "I was right after finances in the partner retreat." [O4].

Most respondents, including "professional" firm counsel, reported having strong management support. In fact, the only two reports of trouble came from respondents whose firms appeared to have weak central management and to cater to individual equity interests. The first example comes from a part-time firm counsel who left his firm over a dispute with firm management:

I would like to go back and be the general counsel at some big firm, but I would only do it if I could be an equity partner, because that is the only way you can have a voice . . .

Q. When you say "voice"—?

A. To the extent you are talking "voice," you're talking about walking down to the corner office and telling some big rainmaker, "No. We're not going to do that," and that's it. He doesn't go to the managing partner and come back to you seven minutes later and say "I'm doing it." At my old firm, it didn't matter if something was unethical; if the person had enough business, they could do it and I couldn't stop them. And to the extent that I could stop them it was only because I had a three million dollar book of business myself. Otherwise, I wouldn't even have been a speed bump. [I5].

The other example comes from the full-time assistant general counsel, who says of herself and the general counsel:

I don't think we get the kind of support most general counsel get I don't think if the general counsel said no way in hell are we doing that that he would get overruled, but sometimes I tell people they can't do something and they say, okay, well, I am talking to [the managing partner], so I just copy him on the response.

Q. Is this in the conflicts context?

A. Yes. If there is a huge client that the firm really, really wants to bring in and we think there's a problem and they really want it, they're going to bring the client in. [I11].

Unfortunately, I do not have independent, systematic data about the strength or structure of management of the firms in the sample. Obviously, it would be interesting to know to what extent the role of firm counsel is shaped by firm management versus firm counsel themselves;¹⁶⁸ and whether certain management styles and structures are more conducive to the success of firm counsel. We touched on this issue in our initial analysis, by noting that compensated in-house positions appeared to be more likely in firms that had other centralized management structures;¹⁶⁹ however, we did not then, and I do not now, have sufficient data to do anything other than speculate on this point.

It seems likely, however, that as the position of firm counsel becomes institutionalized within law firms, we may begin to see more conflict between firm counsel and management. Some firms may appoint firm counsel because it seems like the right thing to do, without fully considering the integration of the position within the firm's management structure. Other firms may want firm counsel so badly that they appoint the wrong person. Thus, the relationship between firm counsel and management will be an interesting topic for research as the position matures.

Besides management support, professional firm counsel cite a variety of potential sources of authority in their dealings with partners. One respondent has found it effective to refer to "how other firms do it" as a strategy for bringing resistant partners around. The following comment comes from a full-time firm counsel who was appointed from outside the firm:

There are pros and cons [to being an outside appointment]. I have not grown up shoulder to shoulder with these people who are now partners in the firm. But when you come from the outside you can tell everyone "that's how other firms do it; that's how our peer firms do it" and that is like the ace of trumps Three or four times I have come in and said, we should do X, and there has been a lot of squawking, and I've said, as a kind of a gambit, let me talk to our peer firms, eight or ten firms, and find out how others do it, and I already know the answer. Or sometimes it is educational, like if the patent attorneys do it one way and [?] do it another, I'll ask them to make the calls. I'll say, "look, why don't you call a few people

168. Thanks to Elizabeth Gorman for raising this issue.

169. See Chambliss & Wilkins, *supra* note 3, at 570-72 (discussing the effect of firm management philosophy on the development of the in-house role).

and see what they do and get back to me.” And we end up getting to the right answer. [I1].

Several respondents get results by invoking the demands of the insurer¹⁷⁰ or reminding partners about past claims against the firm. As I10 reports:

I explain to people that “insurers are breathing down our necks every day.” Everyone understands the need to be able to continue to pay for malpractice insurance. In many jurisdictions, an ethics violation is per se negligence and can be a bootstrap for a malpractice claim. How we measure up to competitors includes the professionalization of risk management. [I10].

Another example comes from a part-time general counsel at a 1,000-plus lawyer firm:

You have to be very open. I’m surprised the number of times I talk about cases where the firm has been sued and people will say, “you mean, we’ve been sued?” Being open about it really increases everyone’s sensitivity. [O3].

Thus my findings contradict the conventional wisdom that full-time firm counsel and those appointed from outside the firm necessarily will face resistance or be frozen out of key decisions. As respondents’ comments suggest, professional firm counsel have a variety of strategies for attracting business and making themselves heard within the firm; and firm counsels’ substantive jurisdictions have a tendency to expand over time. Indeed, in today’s competitive business climate, in which firms increasingly are concerned about professional liability,¹⁷¹ I predict that firms’ demand for professional firm counsel will only increase. Part IV considers what this will mean for the scope and substance of compliance efforts within firms.

170. According to Robert E. O’Malley, former Chief of Loss Prevention Counsel for the Attorneys’ Liability Assurance Society, it is common to hear lawyers say, of some proposed loss prevention policy, “I can’t sell this to my firm, but if you tell us we have to do it, we’ll do it.” See George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 349–50 n.154 (1997) (citing an interview with Robert E. O’Malley, Apr. 1997).

171. See Flahardy et al., *supra* note 4, at 50 (quoting Hildebrandt Institute director James Jones as to firms’ increasing exposure and concerns about liability).

IV. THE PROFESSIONALIZATION OF ETHICS?

The legal ethics literature tends to portray large firm lawyers as unethical or at least “ethically challenged.”¹⁷² Owing perhaps to the relative weakness of disciplinary enforcement in the large firm context,¹⁷³ and more recently to various corporate scandals involving lawyers,¹⁷⁴ large firm partners, especially, are viewed as tending toward self-serving, avaricious behavior¹⁷⁵ and non-compliance with professional regulation.¹⁷⁶ Even the most nuanced pronouncements on large firm lawyers’ ethics tend to be somewhat negative and judgmental. For instance, a recent study of legal ethics among large firm litigators concluded:

Large-firm partners . . . [tend] to deny the moral dimensions of their work entirely, and to reduce most issues to either ethical rules or pragmatic strategies. . . . [O]ur results suggest that the dominant logic of constraint among large-firm litigators is one of “ethical pragmatism,” in which . . . inconvenient ethical strictures are assumed . . . to have pragmatically manageable real meanings. This logic differs significantly from the “ethical

172. See, e.g., David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 204 (2004) (stating that a substantial number of lawyers in private practice “can be described as ethically challenged”) (emphasis omitted); cf. Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the “Metaethics” of Legal Ethics*, 49 EMORY L.J. 87, 96 (2000) (criticizing this view and arguing instead that lawyers are “metaethically challenged”).

173. See Julie Rose O’Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal*, 16 GEO. J. LEGAL ETHICS 1, 58–63 (2002) (noting the limited resources of most disciplinary agencies and the lack of demand for disciplinary action by large-firm clients); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 11, 25 (1991) (discussing the obstacles to disciplinary enforcement against large firm lawyers).

174. See, e.g., LUCIAN T. PERA & BRIAN S. FAUGHNAN, *PARADISE TARNISHED: TODAY’S SOURCES OF LIABILITY EXPOSURE FOR CORPORATE COUNSEL* 7–37 (Association of Corporate Counsel, ed., 2005) (reporting on seven high-profile scandals between 1999 and 2003 in which corporate counsel were named as defendants); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1185–90 (2003) (examining lawyers’ culpability for transactions in the Enron scandal).

175. See, e.g., Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 209–15 (discussing sixteen cases of billing fraud by senior partners at prominent law firms); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 906 (1999) (arguing that large firm partners’ lives are “dominated by money”).

176. See Chambliss, *supra* note 3, at 137–38 (arguing that the legal ethics literature is dominated by a “legalistic” model of professional regulation that tends to portray lawyers as noncompliant in the absence of disciplinary enforcement).

moralism” of judges ... [and] lay conceptions of ethics and morals as ... value commitments.¹⁷⁷

Further, while most commentators would acknowledge the role of firm culture and other organizational factors in shaping individual norms and conduct, many are nevertheless suspicious of firm-level (or “entity”) regulation as a means for promoting accountability and ethical conduct among individual lawyers.¹⁷⁸ Opponents of law firm discipline, for example, argue that the regulation of law firms as entities would undermine individual accountability, by “allowing responsible partners and supervisors to escape personal accountability”¹⁷⁹ and signaling a “lack of personal responsibility for ethics compliance.”¹⁸⁰ Some scholars raise similar concerns about firms’ increasing reliance on in-house ethics specialists and law firm general counsel—or what Professor Margaret Raymond has called “the professionalization of ethics.”¹⁸¹ According to Professor Raymond:

[T]he internal focus on ethics specialists ... suggests that ethics is just another area of specialization, one in which someone else is developing expertise so you don’t have to. This runs the risk of shutting the consideration of ethics to the designated individuals, taking ethical issues out of mainstream discourse.¹⁸²

My findings tend to cast doubt on both of these views. At the risk of sounding like someone who has gotten too fond of her subjects, my impression is that the respondents in my study are pretty ethical people, even by ivory tower standards. Most respondents have a long record of service on bar association committees and task forces devoted to ethical issues, and a number have served as adjunct professors of legal ethics (a sure sign of high standards). As research

177. Suchman, *supra* note 51, at 845–46 (summarizing the main findings of *Ethics: Beyond the Rules*, a study sponsored by the American Bar Association’s Section of Litigation). The study was initiated in response to “a number of highly publicized cases of misconduct by ... large firm litigators.” *Id.* at 837–38.

178. See Chambliss, *supra* note 3, at 120–21 (arguing that lawyers’ resistance to centralized management “significantly inhibits the profession’s approach to lawyer regulation”).

179. MARGARET COLGATE LOVE, A.B.A. ETHICS 2000 COMM’N, FINAL REPORT—SUMMARY OF RECOMMENDATIONS (2001), available at http://www.abanet.org/cpr/e2k-mlove_article.html (reporting the Commission’s reasons for withdrawing its initial support for law firm discipline).

180. O’Sullivan, *supra* note 173, at 20–21.

181. Margaret Raymond, *The Professionalization of Ethics*, 33 FORDHAM URB. L.J. 153, 167 (2005).

182. *Id.* at 159–60.

subjects, respondents were generous with their time, available when they promised to be, and eager to help me convey the importance of systematic self-regulation by firms.

With a few exceptions, respondents also portray the lawyers in their firms as ethical—or at least inclined toward compliance with firm policy and ethical rules. Indeed, respondents' comments suggest that most lawyers are hungry for guidance about the rules and how to comply. Of course, it is tempting to write off such comments as self-serving, especially if one starts with the premise that large firm lawyers tend to be unethical. One also might argue that what passes for "ethical" in large law firms is problematic. Alternatively, however, one might adopt a more sympathetic and respectful approach, which imagines that most large firm lawyers probably are a lot like most of us. From this perspective, respondents' comments may be telling us something important about lawyers' interest in ethical guidance and the benefits of management investment in the firm counsel role.

I do find evidence of "ethical pragmatism"¹⁸³ in the conflict-of-interest context. In fact, several respondents explicitly criticized moralistic approaches to conflicts. However, respondents' pragmatic attitude toward potential conflicts between complex corporate clients contrasts sharply with their attitude toward conduct involving dishonesty, such as billing fraud. Thus, rather than concluding that respondents "deny the moral dimensions of their work,"¹⁸⁴ I suggest that the rules governing conflicts of interest may be unreflective of the moral dimensions of conflicts in the large firm context.

A. *Respondents' Professional Commitments*

Most respondents in the initial sample were clearly professionally committed to promoting ethics and regulatory compliance in their firms and the profession more broadly. Over two-thirds had long records of service on bar committees dealing with ethics and professional responsibility matters and several had served on state or local lawyer disciplinary boards.¹⁸⁵ Twelve of the thirty-two respondents had law teaching experience, most as adjunct professors of legal ethics.¹⁸⁶

183. Suchman, *supra* note 51, at 845.

184. *Id.*

185. See Chambliss & Wilkins, *supra* note 3, at 585–86 (reporting on respondents' personal and professional characteristics).

186. *Id.* at 585.

Litigation was the most common practice specialty among respondents, and all but one respondent had significant litigation experience.¹⁸⁷ Other common practice specialties included insurance, professional liability, banking, and bankruptcy.¹⁸⁸ All of the respondents in the initial sample expressed a strong commitment to "protecting their firms' reputations and interests."¹⁸⁹

The sixteen respondents in the 2005 sample have strikingly similar profiles. Ten have served on one or more bar ethics or discipline committees, and at least four have held leadership roles. Although I do not have systematic data on respondents' law teaching experience, six respondents have written law review or bar journal articles addressing ethics and professional responsibility issues.

As in the initial sample, litigation is the most common practice specialty among the respondents, followed closely by insurance and professional liability. Six respondents have practiced or continue to practice in the ethics and professional liability area. Two respondents have served as ethics or firm counsel in more than one law firm.

There is little correlation between the structure of respondents' positions and their previous specialization in ethics and professional liability matters. For instance, some part-time firm counsel have relatively little service or practice experience in the area, whereas others are highly specialized. The following comment comes from part-time firm counsel at an eighty-lawyer firm:

I had worked in legal malpractice defense since [the early 1990s] . . . so from that I had worked before the [state disciplinary committee] and had a significant interest in ethics. We have also recently established a practice group with the goal of representing lawyers in a variety of issues, risk management, ethics, disciplinary issues, character and fitness, and providing in-house training. [I8].

Likewise, some full-time firm counsel are highly specialized in ethics and professional responsibility matters whereas others came into the job with relatively little experience. I10 describes his background as follows:

I was an insurance lawyer and the partner originally doing it was a corporate lawyer and he didn't have a clue about

187. *Id.* The exception was the one associate in the sample, who was being groomed to take over the role of firm counsel from her supervising partner. *See supra* note 72.

188. *See* Chambliss & Wilkins, *supra* note 3, at 585.

189. *Id.* at 585-86.

insurance, and it came at a time when we were moving out of [one insurance provider] and going with [another] and they wanted someone who knew insurance. I do not have any specific ethics credentials. I had been on the ethics committee for ten years but I was not an ethics wonk. [I10].

I also found no systematic difference between respondents who grew up in their firms and those few respondents who were brought in from outside the firm. In particular, respondents from outside the firm appeared no less committed to protecting the firm's interests; if anything, they were more intent on proving their value to partners and firm management. As one outsider reported, "I did a ten-year claims history and it was news to them. They do the math and think, 'this is a really important area.' But it is a cultural change in terms of getting it on the radar screen." [O4].

Thus, there is little evidence that "professional" firm counsel have systematically different attitudes or orientations to the role than firm counsel who grew up in their firms or those who continue to serve outside clients.

B. Lawyers' Tendency Toward Compliance

Most respondents have a positive view of the lawyers who work in their firms and portray partners, by and large, as tending toward compliance with ethical rules. The following comments are typical:

I don't think we have too many ethical concerns. Most people are pretty good. It is more a matter of getting them to comply with firm policy on how to open files; engagement letters. Not starting work without a conflicts check. [I3].

Situations in which you have to confront outright dishonesty and unethical conduct are rare. Most of the job is proactive—not maybe in the sense that it should be, holding programs and training and such—but solving problems before they become, you know, *problems*. [I5].

This is not to say there are no rogue partners or badly-managed law firms. As several respondents noted, not all partners come to them for advice. According to one part-time firm counsel:

I'm never sure whether any of the major conflict issues or ethical issues are brought to my attention. There's a great variation among members of the firm in terms of who I deal with . . . I find that I spend a lot of time with some partners and

virtually no time with others and it can't be that the ones I don't spend any time with don't have any ethical problems. [A9].¹⁹⁰

Respondents worry especially about the "weird guy" with the "big billings." Consider the following comment:

I haven't really had any real ethical crisis, or ones where I am shaking my head. I do hear from colleagues about the guy down the hall, that partner, he's a weird guy who doesn't report to anyone, but he brings in big billings and no one wants to question him. He plays by his own rules. Like the Sidley Austin partner in the tax shelter matter.¹⁹¹ He brought in huge money so no one questioned him, but they realized he wasn't playing by the game plan. So, in terms of what keeps me up at night. [I12].

As discussed in Part III, two respondents reported having insufficient management support on client intake decisions;¹⁹² and many respondents emphasized the importance of "picking one's spots" [I10] on intake matters. As one respondent said, "[i]f you say no all the time, people will go underground." [A5].¹⁹³ Thus, in some firms, obviously, there is some tension between firm counsel and management regarding client intake decisions.

Yet the fact that not all partners rely on firm counsel—or that not all firms are willing to question the weird guy with the big billings—does not mean that most large firm lawyers are unethical or that the presence of firm counsel undermines individual accountability. On the contrary, my findings suggest that firm counsel serve as a critical resource for many busy but well-intentioned lawyers who "want to practice law the right way . . . [but] haven't looked at the rules of professional responsibility since law school." [I5].

As noted above, many respondents report being bombarded daily with questions from lawyers who are "freaking out and want an answer right away." [I11]. As one full-time respondent reported:

190. *Id.* at 587.

191. This comment presumably refers to the tax shelter work of former Sidley Austin partner R.J. Ruble, who was fired from that firm in 2004. See Charles Toutant, *Settlement Proposed in Class Action Over Porous KPMG Tax Shelters*, N.J. L.J., Oct. 3, 2005, at 7 (noting that "Ruble wrote more than 600 letters to clients declaring the shelters would withstand Internal Revenue Service scrutiny"); *Sidley Austin Tax Chief Moves to Mofo*, N.Y. L.J., Apr. 21, 2005, at 1 (reporting that Ruble was fired from Sidley Austin for violating the firm's partnership agreement).

192. See *supra* Part III.C.

193. Chambliss & Wilkins, *supra* note 3, at 588.

People call me at home, and everything is an emergency. I was going to wallpaper my office with those little yellow message slips, all of them say “it’s an emergency, please call me within the next five minutes.” I could work twenty-four hours a day [I2].¹⁹⁴

Further, firm counsel who are compensated for their in-house service tend to be proactive in building resources and systems for promoting compliance.¹⁹⁵ As one full-time firm counsel put it:

The single biggest most important risk management initiative our firm has put in place is to have a proactive general counsel. I do this full time. It is a big job. So the single biggest thing a firm can do is to have someone worry about those kinds of issues on a full-time basis. [O4].

Thus, rather than assuming the worst about large-firm lawyers, we might do better to focus on strategies for promoting firm counsels’ authority and the development of a shared conversation about the moral dimensions of their work. As one respondent observed:

People in firms are reluctant to talk to academics because they tend to view academics as ideological. There is this idea that lawyers are always trying to cut corners. But lawyers call me all the time with questions. Once the firm began providing this service, and lawyers knew there was someone there who had an answer—lawyers are big rules-followers. [I1].

C. “Ethics” v. “Risk Management”

One topic about which a shared conversation would be useful is the profession’s approach to conflicts of interest in the large firm context. Respondents talk about conflicts very differently than other ethical issues. In the conflicts context, respondents speak in terms of “probability” and “risk,” and their language reflects the “avoidance or suspicion of any moral calculus”¹⁹⁶—similar to the approach of large firm litigators to the rules governing pre-trial discovery.¹⁹⁷ As I10 said, in the context of conflicts:

194. *Id.* at 586.

195. *Id.* at 574–75 (providing examples from the initial sample).

196. Frenkel et al., *supra* note 50, at 705.

197. See Suchman, *supra* note 51, at 845 (quoting a partner who said that in litigation, “the area of morals is a murky place to be, and you don’t want to go there”).

We commit ethical violations, by someone's definition, every day. Everything involves risk. It's shades of gray So whether it is unethical in some clear way is usually not the question. The question is: what's the risk? It's a legal positivist [standard]. [I10].

Or, consider the following hypothetical from a full-time firm counsel at a 300-lawyer firm:

Here's a tough issue. Suppose you have a firm where there is big possible piece of business but there is a possible adverse issue to a former client. And the [current] client is a grown up. Is it or is it not "substantially related"? That's where you enter a probabilistic world and think, what are the odds of them bringing [a disqualification motion]? They may have a glass house on their side. Lots of federal courts do this by the seat of their pants—disqualification judgments are not appealable—so there is no case law. They cite some really weird things. And the client says okay, but the disqualification motion is on your dime. And the firm says okay. "Substantially related" is not a physicist's test. It depends on the judge you draw, what court you're in. Some would argue you *have* to go for it. [I1].

In fact, several firm counsel expressed strong opinions that a normative approach to conflicts is misguided—and disingenuous—in the large firm context. The following comments are representative:

We take risks all the time and we know what they are. God knows the courts get them confused. Able lawyers come in and say "there's a conflict of interest, what could be worse[?]" Thirty to forty percent of malpractice claims have in them a conflict of interest, although it is often hard to connect the conflict with any actual harm. But the jury goes to town. What you and I would consider a risk issue, not a moral issue, gets treated by the courts and juries as indistinct from the drug addict lawyer who stole money from his client trust accounts. It is something that really frosts me. For big firms and lawyers it is something that is self-enforced in every other part of the world There are lots of foaming-at-the-mouth moralists in the field [I10].

I mean, loyalty is important but if you are adverse to some affiliate in some whole different line of business I don't think that is disloyal. You have some huge monstrosity of a client

and you can use that to create a sideshow—you can make a lot of hay out of that; but some courts are saying it is just as much an appearance of impropriety to make some ranting motion as it is to have a conflict in the first place. If you can't point to a harm you are going to suffer, you shouldn't file the motion. [I11].

By contrast, three respondents told me off-the-record stories about lawyer misconduct that they clearly viewed as shocking and shameful—so shameful that they did not want me to report the details even without attribution. I am free to say that all three stories involved some type of billing fraud. I also would add that two of the stories involved misconduct by associates rather than partners, and none of the stories struck me as being quite as shocking as respondents seemed to believe. In any case, in discussing these stories, respondents used explicitly normative terms such as “stealing” and “fraud.”

Thus, while it may be that large firm lawyers tend toward a lamentable “ethical pragmatism,” in which ethics rules are interpreted to be consistent with the lawyer's own ends,¹⁹⁸ it is also possible that this pragmatic approach is restricted to certain types of issues—for instance, those in which the clients are “grown ups” and everyone is in the same “game,”¹⁹⁹ such as large firm litigation and conflicts of interest.²⁰⁰ Indeed, this may be an area in which morality demands a pragmatic approach, rather than scrupulous compliance with formal rules.²⁰¹ Certainly firm counsel are not alone in finding the rules governing conflicts of interest impractical or worse in the large firm context. As I11 notes, some courts have begun to crack down on the strategic use of motions to disqualify,²⁰² and commentators increasingly are pointing to the waste and abuse

198. *Id.* at 843–44.

199. *Id.* at 850 (finding that large firm litigators “described actual discovery practice in the language of adversarial gamesmanship, as a highly stylized competition in which each side could be counted upon to employ a fairly predictable repertoire of maneuvers”).

200. See Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 973–74 (2001) (arguing that sophisticated parties should be allowed to enter into prospective conflicts waiver agreements).

201. See Suchman, *supra* note 51, at 854 (reporting that “walking the line” between overcaution and overzealousness “was the morally preferred position” among large firm litigators).

202. See, e.g., Matthew F. Boyer, *In the Wake of Infotechnology: Stricter Scrutiny of Attorney Disqualification Motions*, 22 DEL. LAW. 16, 16 (2005) (arguing that Delaware courts have moved from resolving “all doubts in favor of disqualification,” to viewing disqualification as “a severe sanction, that ‘is not favored’ ” (citations omitted)).

associated with attorney disqualification.²⁰³ Thus, there is room for argument about the moral dimensions of conflicts issues in the large firm context.

V. IMPLICATIONS

From a regulatory standpoint, the professionalization of firm counsel is a positive development. Most basically, professionalization is reflective of law firms' increasing investment in self-regulation and the associated development of a market niche for compliance specialists within firms. The formalization and increasing specialization of the firm counsel position has helped to clarify the firm's identity as the client, and expanded the resources available to firm members, without compromising the authority of firm counsel or necessarily undermining their involvement in sensitive and strategic issues. Thus, as to the central question of this Article—what does the professionalization of firm counsel mean for the quality of self-regulation by large law firms?—my findings are unequivocal. Professional firm counsel contribute enormously to effective self-regulation by firms.

That being said, there are several findings that warrant continuing attention and research. First, as discussed in Part II, firm counsel who are appointed from outside the firm appear to start off with a somewhat different jurisdiction than firm counsel who grew up in their firms, with more attention to staff and administrative matters and less involvement in conflicts and ethics.²⁰⁴ Because the outside appointment of firm counsel is still a recent and relatively rare phenomenon, it is not yet clear to what extent this finding indicates a necessary or permanent shift in the orientation of firm counsel; or, if so, whether it is tied to the structural characteristics of the firm counsel position. As noted above, my findings on this point are consistent with findings on the jurisdiction of general counsel in Am Law 200 firms,²⁰⁵ many of whom are in part-time positions²⁰⁶ and all of

203. See Kenneth L. Penegar, *The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts*, 8 GEO. J. LEGAL ETHICS 831, 832 (1995) (estimating that there are disqualification orders in two-thirds of all lawsuits); Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 NOTRE DAME L. REV. 655, 681 (1997) (noting that many companies conduct business "through a series of corporate entities . . . using an impenetrable fog of subsidiaries and affiliates"); Leah Epstein, Comment, *A Balanced Approach to Mandamus Review of Attorney Disqualification Orders*, 72 U. CHI. L. REV. 667, 671–73 (2005) (noting the inconsistency in the substantive law of attorney disqualification).

204. See *supra* Part II.B.

205. See *supra* notes 146–47 and accompanying text.

whom came from inside their firms.²⁰⁷ Thus it may be that the shift I observe reflects the expansion of the position; or is related to firm characteristics, such as size; or is simply a blip in the data.

For instance, several respondents in the initial sample reported that they serve primarily as the “point person” for a wide a range of issues, many of which they do not handle themselves.²⁰⁸ According to one full-time firm counsel at 750-lawyer firm:

I think the firm looked at [the creation of my] position as having a point person. You can decide if it is a point person or a lightning rod . . . but a person that’s out there that can serve as . . . the first point of contact . . . sort of a locus point for people to come to with all sorts of different questions on all sorts of different topics, from senior people to the most junior people Having been around since 1984 when I started, and always having been at the same firm, even in the summers, if it’s not in my jurisdiction, I know where to send it. So I have that sort of—mediator is not the right word but—facilitator role. [B4].²⁰⁹

Thus, some of the shift I observe may be related to the ascendance of this managerial model, rather than a reflection of cultural resistance to full-time firm counsel or those appointed from outside the firm. This model may be especially prevalent in large, multi-office firms. The following comment comes from part-time firm counsel at a 175-lawyer firm:

General counsel of really big firms generally have assistant general counsel. They assume a managerial function where they are supervising other general counsel. It’s less hands-on lawyering and more like managing problems. They become like litigation managers in corporations, or . . . specialists in employment law, human relations law. But not as hands-on, across-the-board as someone like me. Especially in firms that are more spread out geographically. They are going to spend a lot of time on the road, meeting people and making sure they are all aware of the latest policies. [I3].

This does not mean that the issue of cultural resistance drops out of the analysis entirely, however. Even if the managerial model is

206. See FLASH SURVEY, *supra* note 5, at 3 (reporting that 68% of respondents were part-time general counsel in 2005).

207. See *supra* note 6 and accompanying text.

208. See Chambliss & Wilkins, *supra* note 3, at 575–76.

209. *Id.* at 575.

primarily a consequence of firm size and structure, questions about who has jurisdiction over conflicts and ethics and the nature of that person's authority remain important in any analysis of law firm self-regulation. Thus, the scope of firm counsels' jurisdiction and its relationship to ethics and regulatory issues remain important questions for future research.

A second finding warranting further attention is the growing importance of professional networks among firm counsel. As Part III argues, appeals to external networks and the demands of insurers are important sources of authority for "professional" (full-time and outside) firm counsel.²¹⁰ Indeed, one of the key findings of the paper is that the professional authority that comes from membership in such networks may substitute for the personal authority that comes from long tenure in the firm.

This makes the development of professional networks—and the standards that are defined and transmitted through such networks—critical variables in determining the future scope and effectiveness of self-regulation by firms. To the extent that firm counsel develop strong professional networks that unite around a particular standard for compliance, this standard can be expected to define the industry standard for years to come. If firm counsel fail to develop strong networks, or if such networks reinforce the wrong standard, the consequences could be similarly far-reaching.

The growing importance of professional networks has both research and political implications. As a research matter, it suggests the need to examine closely the role of insurers and law firm consultants, both of whom have a stake in the authority and ideology of firm counsel. It also will be important simply to map the networks that develop, taking note of divisions by firm size, client base, and the structure of the firm counsel position. My impression thus far is that firm size and location are important determinants of the professional identities of firm counsel, with firm counsel in large firms based in major cities gravitating toward different networks than those in smaller firms in smaller cities. I suspect that the identity of the firm's primary insurer also may play an important role in shaping associations among firm counsel. These are merely impressions, however, offered as starting points for future research.

As a political matter, the development of professional networks among firm counsel is an opportunity for academics who want to contribute to the effectiveness of professional self-regulation. As

210. *See supra* Part III.C.

Fred Zacharias has observed, “the [legal] ethics codes and the scholarly literature are replete with empirical assumptions that require empirical testing and justification.”²¹¹ Yet, empirical ethics research is “notoriously difficult,”²¹² especially when the researchers are viewed—perhaps rightly—as being judgmental. The only consistent finding in the empirical ethics literature is that most people view themselves as more ethical than other people.²¹³

Firm counsel, however, are an emerging and likely to be influential group who are right now in the process of developing a distinct identity and professional ideology. This ideology, in turn, has the potential to influence a generation or more of lawyers who “grow up” in large firms. Thus, this is an important conversation for academics to join. Academic attention through research and conferences could contribute significantly to the development of collaborative networks and shared professional norms between legal ethics teachers and large firm practitioners. Promoting the visibility and importance of firm counsel also could contribute to firms’ investment in the firm counsel position and enhance firm counsels’ authority within firms.

I conclude by quoting a somewhat lengthy exchange with I11, the full-time assistant general counsel quoted at several points throughout the paper. More than any other, this exchange summarizes the demands and rewards of the firm counsel position, and the professional frustrations and dedication of the lawyers who hold it.

Q. Are you compensated like a partner?

A. I am a partner. I am compensated on the low end of the partner level. [The general counsel] is in the mid-range. One

211. Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 235 n.39 (1993).

212. Hugh P. Gunz & Sally P. Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 241, 246 (2002). See generally Andrew Crane, *Are You Ethical? Please Tick Yes or No, On Researching Ethics in Business Organizations*, 20 J. BUS. ETHICS 237 (1999) (critically reviewing the current state of empirical ethics research); D.M. Randall & A.M. Gibson, *Methodology in Business Ethics Research: A Review and Critical Assessment*, 9 J. BUS. ETHICS 457 (1990) (reviewing ninety-four studies published between 1982 and 1990).

213. See Robert C. Ford & Woodrow D. Richardson, *Ethical Decision-Making: A Review of the Empirical Literature*, 13 J. BUS. ETHICS 205, 219 (1994) (reviewing findings on the comparative importance of individual and situational factors in ethical decision-making).

thing that kind of bothered me—I complained about my compensation a bit and was told I should bring in clients and it's like, when am I going to service those clients? My hours are worse than full-time outside practice. I go from first thing in the morning to late at night because of the people on the West Coast. I get phone calls all day Saturday at home. I work 250–300 hours per month.

Q. Do you think you will stay in this position?

A. Yes, I enjoy it. It never gets boring. It is like litigation without two years of discovery. Motions to disqualify in a big case are really exciting—it is a trial within a trial—so you get to do the whole nine yards, but without two years of interrogatories. So it's never dull. Okay, conflicts searches are dull. But it is interesting, ethics. It is what being a lawyer is all about. The tenets of professional conduct. I also enjoy knowing everyone in the firm. And when you help someone out, they are really grateful. When you clear a conflict no one thinks you could clear, you get two clients instead of one.

Q. You should get origination credits.

A. I'm going to be working on that. It's a fun job.

VI. APPENDICES

Appendix A. Characteristics of Respondents and Firms

	<u>2001–2002</u> N (% of total 2001–2002 sample)	<u>2005</u> N (% of total 2005 sample)	<u>Combined Sample Total N</u> (% of combined sample)
INDIVIDUAL RESPONDENTS	32 (67%)	16 (33%)	48 (100%)
Gender			
Male	27 (84%)	14 (88%)	41 (85%)
Female	5 (16%)	2 (13%)	7 (15%)
Titles* Including Words			
“Counsel”	10 (31%)	9 (56%)	19 (40%)
“Ethics/PR”	7 (22%)	3 (19%)	10 (21%)
“Risk/Loss”	2 (6%)	2 (13%)	4 (8%)
“Committee”	13 (41%)	6 (38%)	19 (40%)
Structure of Position			
Full-time	10 (31%)	5 (31%)	15 (31%)
Part-time, Compensated	5 (16%)	6 (38%)	11 (23%)
Part-time, Uncompensated	16 (50%)	5 (31%)	21 (44%)
Missing	1 (3%)	0 (0%)	1 (2%)
Appointment			
Inside	30 (94%)	13 (81%)	43 (90%)
Outside	2 (6%)	3 (19%)	5 (10%)
FIRMS			
Size	32 (68%)	15 (32%)	47 (100%)
35–100	5 (16%)	3 (20%)	8 (17%)
151–250	6 (19%)	1 (7%)	7 (15%)
251–500	10 (31%)	2 (13%)	12 (26%)
501–999	7 (22%)	6 (40%)	13 (28%)
1,000+	4 (13%)	3 (20%)	7 (15%)
Location			
East Coast	23 (72%)	8 (53%)	31 (66%)
Midwest	7 (22%)	5 (33%)	12 (26%)
Other	2 (6%)	2 (13%)	4 (9%)

* Percentage does not equal 100% because not all titles are included and some respondents have more than one title.

Appendix B. List of Respondents by Firm Size and Structure of Position

Respondent ID	Firm Size Category	Structure of Position	Outside Appointment
A1	251–500	Full Time	
A2	251–500	Part Time, Compensated	
A3	501–999	Part Time, Volunteer	
A4	501–999	Part Time, Volunteer	
A5	1,000 +	Part Time, Volunteer	
A6	251–500	Part Time, Volunteer	
A7	501–999	Full Time	
A8	1,000 +	Full Time	
A9	151–250	Part Time, Compensated	
A10	1,000 +	Part Time, Compensated	
A11	251–500	Full Time	
A12	151–250	Full Time	
A13	35–150	Full Time	
A14	501–999	Part Time, Compensated	Yes
B1	251–500	Missing	
B2	501–999	Part Time, Volunteer	
B3	251–500	Part Time, Volunteer	
B4	501–999	Full Time	
B5	151–250	Part Time, Volunteer	
B6	251–500	Part Time, Volunteer	
B7	151–250	Part Time, Volunteer	
B8	151–250	Part Time, Volunteer	
B9	151–250	Part Time, Volunteer	
B10	251–500	Full Time	
B11	1,000 +	Full Time	

Respondent ID	Firm Size Category	Structure of Position	Outside Appointment
C1	35–150	Part Time, Volunteer	
C2	35–150	Part Time, Volunteer	
C3	35–150	Part Time, Volunteer	
C4	35–150	Part Time, Volunteer	
IA	501–999	Part Time, Volunteer	
IB	251–500	Full Time	Yes
IC	251–500	Part Time, Compensated	
I1	251–500	Full Time	Yes
I2	501–999	Part Time, Compensated	
I3	151–250	Part Time, Compensated	
I4	35–150	Part Time, Volunteer	
I5	251–500	Part Time, Volunteer	
I6	501–999	Part Time, Volunteer	
I7	35–150	Part Time, Volunteer	
I8	35–150	Part Time, Volunteer	
I9	Same as A2	Part Time, Compensated	
I10	501–999	Full Time	
I11	501–999	Full Time	
I12	1,000 +	Full Time	Yes
O1	501–999	Part Time, Compensated	
O2	501–999	Part Time, Compensated	
O3	1,000 +	Part Time, Compensated	
O4	1,000 +	Full Time	Yes

